No. 1022. 0.8.

Brief of Dean for Appts. Con Der

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Supreme Court of the United States.

IN THE MATTER 1022

of

THE PETITION OF ROBERT W. WORKMAN, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief on behalf of the Respondent and Appellant, The Mayor, Aldermen and Commonalty of the City of New York, in Opposition.

FRANCIS M. SCOTT,
Counsel to the Corporation,
Proctor for the Respondent and Appellant,
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

DAVID J. DEAN,
THEODORE CONNOLY,
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Advocates.

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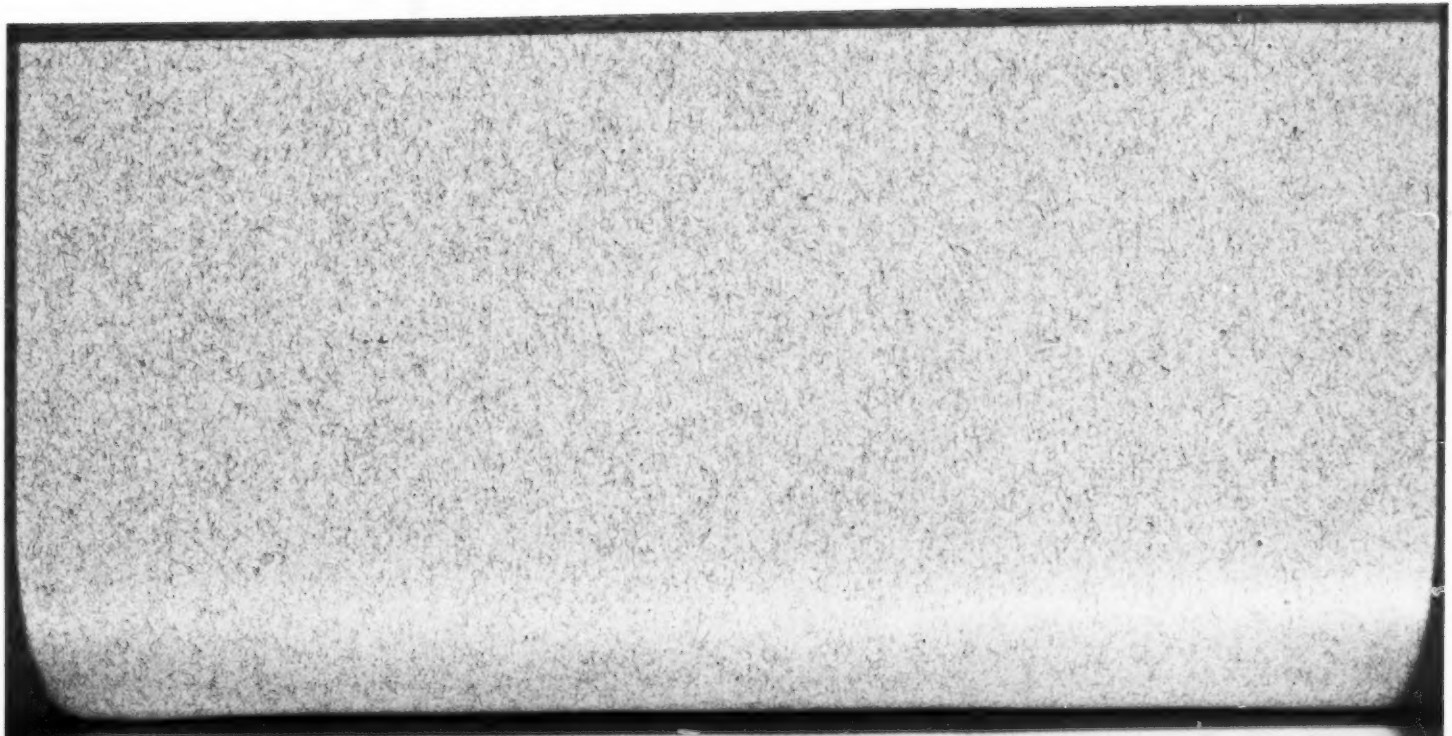

Supreme Court of the United States.

IN THE MATTER

of

The Petition of ROBERT W. WORKMAN for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Brief on behalf of the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York, in opposition to the petition of Robert W. Workman for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The petition filed in this proceeding having been served upon the Counsel to the Corporation late in the afternoon of Wednesday, May 15, the Counsel to the Corporation is compelled to ask permission of the Court to attach and file as part of this brief in opposition to the petition, as Schedules A and B, the briefs argued on behalf of the respondent and appellant, the Mayor, Aldermen and Commonalty of the City of New York,

in the United States Circuit Court of Appeals for the Second Circuit.

The attention of the Court is respectfully called, however, to certain propositions which, not being under discussion in the Circuit Court of Appeals, were not argued upon the briefs in that Court.

In the act "to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," by section 6 of that act, the judgment of the Circuit Court of Appeals in all cases arising out of admiralty cases is made final, with the proviso that in every subject within the appellate jurisdiction of the Circuit Court of Appeals, upon which the judgment of that Court is, by the terms of the act, made final, that Court *may* certify to the Supreme Court of the United States, any question or proposition of law *concerning which it desires the instruction of that Court*, for its proper decision.

We assume that the Supreme Court will not, where the Circuit Court of Appeals has not only declined to certify *any* question or proposition of law involved in this cause, as a question or proposition, upon which it desires instruction, but in the unanimous opinion of the Court declares the fact to be (see Record, p. 132, fol. 528).

> "*We entertain no doubt* that the City was not li-
> "able for the negligent management of the fire-
> "boat in the present case."

direct that the proceeedings be certioraried, that a doubt not existing in the mind of the Judges of the Circuit Court of Appeals, may be litigated in this Court for the gratification of the libellant.

Of the propositions of law requested to be certified by the United States Circuit Court of Appeals to this

Court, the propositions numbered 1, 2, 3, 4 and 5 are fully discussed in the brief and argued on the hearing of the appeal in the Circuit Court of Appeals, to which we beg leave to refer the Court.

The proposition requested to be certified at page 5, and numbered 6, the Court will observe is not a question properly reviewable by certiorari, since no such contention was made either in the District Court, or in the Circuit Court of Appeals, and is a proposition that does not properly arise upon the record.

The State of New York, of course, has never exempted the municipal owner of a steam vessel from the liabilities imposed on other vessels. Such exemption as exists, exists by operation of law, and is an exemption conferred by the Courts in a long line of decisions, and not by any legislative exercise of power.

We respectfully submit that the question submitted at page 6 of the petition under number 4. that in this controversy a question of constitutional law is involved, ought not to be made the subject or basis of a certiorari to this Court for three reasons :

1st. Because that question does not arise properly upon the record.

2d. Because, as will appear by the record, it was not argued as a proposition of law in the Court below.

3d. Because the only way in which a question of constitutional law could arise would be where the jurisdiction of the United States courts to pass upon the merits of a controversy within the admiralty jurisdiction of the courts of the United States was raised.

We are well aware that the question of the granting of a writ of certiorari is always within the discretion of this honorable court, but we assume that unless con-

clusions reached by an appellate court, constituted with an appellate jurisdiction designed finally to decide and determine certain questions, are clearly questionable, a writ of certiorari will not be granted.

All of which is respectfully submitted.

FRANCIS M. SCOTT,
Counsel to the Corporation,
Proctor for the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York.

DAVID J. DEAN,
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(5440)

[REG. 44, FOL. 448.]

Schedule A.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

ROBERT W. WORKMAN,
Libelant and Appellee,

vs.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW-YORK, and JAMES A. GALLAGHER,
Respondents and Appellants,

(Impleaded with the Fire Department of the City of New York).

Brief and Points for Respondents and Appellants.

STATEMENT.

This is an appeal by the respondents and appellants from a decree of the District Court awarding the libelant and appellee the sum of $815.84 as damages, interest and costs, against the Mayor, Aldermen and Commonalty of the City of New York and against

James A. Gallagher, pilot of the fire-boat "New Yorker."

On Sunday the 11th day of June, 1893, the barkentine "Linda Park" was lying on the easterly side of Pier 48, East river, and moored a sufficient distance in toward the bulkhead, with her bow pointing toward the river, to allow of a schooner's being moored to the same pier with *her* bow *in* toward the bulkhead, allowing a space of some 6 feet between the ends of the respective bowsprits (see Case, p. 9, fols. 35–38; p. 37, p. 38, fol. 149), and alongside of the barkentine "Linda Park" lay a barge with a beam of from 30 to 35 feet (see Case, p. 38, fol. 152). On the opposite pier and on the westerly side of Pier 49 was a covered railroad barge with a beam of some 40 feet (see Case, p. 39, fol. 153).

By reference to a diagram in the case, the respective dimensions of the piers and bulkhead and the extent of the open water between Piers 48 and 49 will appear as follows: The width of the bulkhead between the piers is shown to be 129 feet, and 54 inches; the length of Pier 48 is shown to be 329 feet and 58 inches; and the length of Pier 49, 324 feet and 99 inches; and the clear water between the piers at the extreme ends upon the river front, 126 feet and 42 inches.

Allowing for the closing of the clear water between the extreme ends of Piers 48 and 49, by the width of the barge at 40 feet, lying practically at the end of Pier 49, alongside the pier, and the width of the schooner lying practically at the extreme end of Pier 48 at 30 feet, the 126 feet and 42 inches of clear water is reduced by 70 feet, leaving 56 feet and 42 inches of clear water between Piers 48 and 49.

Some time between 3 and 4 o'clock Sunday afternoon, June 11, a fire broke out at the corner or Clinton street, and both the fire-boats "New Yorker" and "Havemeyer" were summoned by telegraph to the scene. At

the time the tide was running strong flood and the "Havemeyer" (known as Engine Company No. 43) coming down the East river and against the tide, from her station at the foot of Grand street, running in between Piers 48 and 49, made fast to the proper place at the bulkhead, and commenced to play upon the fire (see Case, pp. 54 and 55, fols. 213–220).

The "New Yorker," a larger and heavier boat, summoned from her station, Pier 1, North river, coming up with the tide and attempting to enter the slip, was caught by the eddy between the piers and swept against the "Linda Park." At the time the "New Yorker" reached the slip, according to the testimony of the libelant's witnesses, the fire had been under way some 20 or 30 minutes and was then blazing (see Case, p. 53, fol. 210).

For the injury done to the barkentine, on the 27th day of July, 1893, a libel was filed against the Mayor, Aldermen, and Commonalty of the City of New York as sole respondents. On the 8th day of August, 1893, an answer was interposed by the Mayor, Aldermen and Commonalty, defending both upon the merits and upon the law, upon the ground that they were not responsible for any acts of negligence committed by the servants and employees of the Fire Department (see Case, pp. 3–11).

This case having been on the calendar of the District Court for a number of days and answered, "ready," the respondents, the Mayor, Aldermen and Commonalty of the City of New York, on the 9th day of November, 1893, were ordered to show cause why the libel should not be amended by making the Board of Fire Commissioners of the City of New York, and the Captain of the fireboat "New Yorker," parties defendant therein (Case, fol. 12).

The motion to amend the libel coming on to be heard before the District Judge on November 10, 1893, the

District Judge allowed the amendment prayed for and allowed the respondent to bring in both the Fire Department and the defendant, Gallagher, but upon the ground that

> " The authorities cited in the defendants' brief
> " make it apparently very doubtful whether the
> " libellant can recover against the City for the
> " faults of the Fire Department, however clear the
> " fault of the 'New Yorker' may be " (see Case,
> " page 15).

Upon the order entered upon that decision of December 1, an amended libel was filed against the Mayor, Aldermen and Commonalty of the City of New York, against the Fire Department of the City of New York and James A. Gallagher, the pilot (see Case, p. 17).

On the 12th, the defendant, Gallagher, filed his answer defending upon the merits (see Case, pp. 21 to 27). The respondent, the Fire Department, excepted to the libel for want of sufficiency, in that the amended libel failed to allege in what capacity the Fire Department of the City of New York was sued, and failed also to allege whether the Fire Department of the City of New York was a corporation, foreign or domestic, and because also there was no negligence charged in the amended libel against the Fire Department (see Case, p. 28).

These exceptions coming on to be heard on the 27th day of December, 1893, the District Court entered an order sustaining certain of the exceptions as therein recited (see Case, p. 29), and thereafter an amendment to the amended libel was filed (see Case, p. 31) and thereafter the Fire Department answered (see Case, pp. 32 to 35), and the questions involved were at issue between all the parties of the record.

The case came on to be heard before the Judge of the District Court on the 9th day of April (see Case, p. 36), and thereafter the District Court decreed that

the libel be dismissed as against the Fire Department of the City of New York, but rendered a decree against both the Mayor, Aldermen and Commonalty of the City of New York and against James A Gallagher, the pilot, which is the decree now appealed from.

POINTS.

I.

The Mayor, Aldermen and Commonalty of the City of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the Commissioners of the Fire Department in the performance of their public duties.

This exemption from liability springs from the nature of the duty performed by the officers and members of the Fire Department.

The extinguishment of fires is undertaken as a public or governmental duty, imposed for the public or general benefit, and from which the Corporation derives no corporate benefit or emolument.

The distinction between the powers and duties of municipal corporations from which corporate emolument is derived and those functions which are purely governmental, performed for the public good, from which no benefit or revenue comes to the Corporation, is made the test of liability for the consequence of neglect on the part of the agents necessarily employed by the Corporation.

In Dillon on Municipal Corporations, vol. 1, p. 107, 4th ed., it is said, concerning municipal corporations, that they "possess a double character; the one gov-

"ernmental, legislative, or public; the other in a sense "proprietary or private.

"The distinction between these, though sometimes "difficult to trace, is highly important and is frequently "referred to, particularly in the cases relating to the "implied or common-law liability of municipal cor- "porations for the negligence of their servants, agents, "or officers in the execution of corporate duties and "powers."

Dillon on Municipal Corporations, 4th ed., vol. 2, page 1180, section 966, further says that municipal corporations are "considered to be impliedly liable (un- "less the legislation negatives such liability) for wrong- "ful acts done in what is termed their private or cor- "porate character from which they derive some special "or immediate advantage or emolument, but not as to "such acts done in their public capacity as governing "agencies in the discharge of duties imposed for the "public or general (not corporate) benefit."

The following cases are cited in support of the doctrine thus defined:

Oliver *vs.* Worcester, 102 Mass., 489.
Richmond *vs.* Long's Adm., 17 Gratt., 375.
Petersburgh *vs.* Applegarth, 28 Gratt., 321.
Western Savings Fund Society *vs.* Philadelphia, 31 Pa. St., 175, 189.
Bailey *vs.* The Mayor, 3 Hill, 531.
Maximilian *vs.* The Mayor, 62 N. Y., 160.

The following is quoted from Oliver *vs.* Worcester, 102 Mass., 489:

"The distinction is well established between the "responsibilities of towns and cities for acts done "in their public capacity in the discharge of duties "imposed on them by the Legislature for the pub- "lic benefit, and for acts done in what may be "called their private character, in the management "of property and rights voluntarily held by them "for their own profit and advantage as a corpora-

"tion, although inuring ultimately to the benefit "of the public."

In Bailey *vs.* The Mayor, 3 Hill, 531, the distinction between the public and private capacity of municipal corporations is maintained by Chief Justice Nelson. He says, in relation to municipal powers:

"If granted for public purposes exclusively they "belong to the corporate body in its public politi- "cal or municipal character. But if the grant was "for the purposes of private advantage and emolu- "ment, though the public may derive a common "benefit therefrom, the corporation, *quoad hoc*, is to "be regarded as a private company."

And from such considerations the question of liability in the case was determined.

In the same case, 2d Denio, 433, the same distinction between governmental duties exercised for public benefit, and the duties through which the corporation derives benefit for itself is maintained, and the exemption contended for in the case at bar recognized, as follows:

"On the other hand, where such corporation is "bound to appoint an officer for the performance "of a public duty it is not liable" (p. 446).

In Maximilian *vs.* The Mayor, 62 N. Y. Rep., the Court of Appeals say:

"There are two kinds of duties which are im- "posed upon a municipal corporation: one is of "that kind which arises from the grant of a "special power, in the exercise of which the "municipality is as a legal individual; the other "is of that kind which arises, or is implied, from "the use of political rights under the general law, "in the exercise of which it is as a sovereign. The "former power is private, and is used for private "purposes; the latter is public and is used for

" public purposes (Lloyd *vs.* The Mayor, 5 N. Y.,
" 374). The former is not held by the munici-
" pality as one of the political divisions of the
" State; the latter is. In the exercise of the for-
" mer power, and under the duty to the public
" which the acceptance and use of the power in-
" volves, a municipality is like a private corpora-
" tion, and is liable for a failure to use its power
" well, or for an injury caused by using it badly.
" But where the power is intrusted to it as one of
" the political divisions of the State, and is con-
" ferred, not for the *immediate* benefit of the mu-
" nicipality, but as a means to the exercise of the
" sovereign power for the benefit of all citizens, the
" corporation is not liable for nonuser, nor for mis-
" user by the public agents (Eastman *vs.* Meredith,
" 35 N. H., 284).

" Where the duties which are imposed upon
" municipalities are of the latter class, they are
" generally to be performed by officers who, though
" deriving their appointment from the corporation
" itself, through the nomination of some of its
" executive agents, by a power devolved thereon
" as a convenient mode of exercising a function of
" government, are yet the officers, and hence the
" servants, of the public at large. They have
" powers and perform duties for the benefit of all
" the citizens, and are not under the control of the
" municipality, which has no benefit, in its cor-
" porate capacity, from the performance thereof.
" They are not then the agents or servants of the
" municipal corporation, but are public officers,
" agents or servants of the public at large,
" and the corporation is not responsible
" for their acts or omissions, nor for
" the acts or omissions of the subordinates by them
" appointed (Fisher *vs.* Boston, 104 Mass., 87).
" And where a municipal corporation elects or ap-
" points an officer, in obedience to an act of the

"legislature, to perform a public service, in which "the corporation has no private interest, and from "which it derives no special benefit or advantage "in its corporate capacity, such officer cannot be "regarded as a servant or agent of the municipality, "*for whose negligence or want of skill it can be held* "*liable.*

"It has appointed or elected him, in pursuance "of a duty laid upon it by law, for the general "welfare of the inhabitants or of the community."

In the same case the Court further says:

"Where it (the City) authorizes a use of its cor- "porate property, which use itself makes that "property harmful to others, it is liable. Such is "understood to be one of the grounds on which "went Bailey *vs.* The Mayor (2 Denio, 433). And "the duty of keeping in repair streets, bridges, and "other common ways of passage, and sewers, and "a liability for a neglect to perform that duty rests "upon an express or implied acceptance of the "power and an agreement so to do. It is a duty "with which the City is charged for its own cor- "porate benefit, to be performed by its own agents, "as its own corporate act (Conrad *vs.* Trustees of "Ithaca, 16 N. Y., 158). It is not always easy to "say within which class a particular case should "be placed. But when it is determined that the "power and duty are given and taken for the ben- "efit of the corporation as a corporate body, "and the act to be done is to be done by "it through agents of its appointment and under "its control and power of removal, there is no "doubt of its liability for negligent omission or "negligent attempt at performance. When the "powers created and duly enjoined are given, and "laid upon officers to be named by the corporation, "but for the public benefit and as a convenient "method of exercising a function of general gov-

"ernment, and the corporation has no immediate
"control nor immediate power of removal of those
"officers, nor of their subordinates and servants,
"then it is not liable for their negligent omission
"or action."

The doctrine of Maximilian *vs.* The Mayor has been repeatedly reaffirmed and enforced by the Court of Appeals of the State of New York in subsequent cases.

In Bieling *vs.* The City of Brooklyn, 120 N. Y., Rep., p. 98, where there was a recovery for damages sustained in consequence of the fall of a wooden awning in a street of the City, the Court says:

"The municipality can perform its functions
"only through officers or agencies. For the dis-
"charge of those powers of a governmental or
"political character, which are vested by the
"statute in officers, and those duties not placed
"upon it but upon officers or departments created
"and vested with powers for public purposes, as
"distinguished from those for the purposes of the
"corporation, it is not responsible for their
"misconduct or neglect, to individuals suffering
"damages as the result of it (Lloyd *vs.* Mayor,
"etc., 5 N. Y., 374; Maximilian *vs.* Mayor, etc., 62
"id., 160; Ham *vs.* Mayor, etc., 70 id., 459; Smith
"*vs.* City of Rochester, 76 id., 506.)

"There are various duties which are legitimately
"those of the corporation, amongst which is that
"of taking care of the streets within it. To keep
"them in safe condition for public use was a
"primary duty resting upon the City of Brooklyn."

The same principle has been adjudicated in other States.

In Mead *vs.* New Haven, 40 Conn., 72, where a City, under power given by its charter, appointed an in-

spector of steam boilers within the City, and by by-law imposed a penalty on any person who should use such a boiler without having it tested by the inspector, it was held that the City was not liable for negligence of the inspector in the discharge of his duty.

The Court says :

"The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The City, as such, has no pecuniary or individual or private interest in the matter, and although the power of the City over the subject is conferred by the charter, and not by the general law, yet the City must, we think, be regarded as the agent of the government, and, acting for the State, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence."

See also—

Brown *vs.* Vinalhaven, 65 Maine, 402.
Mitchell *vs.* Rockland, 52 Maine, 118.

II.

This exemption from liability growing out of the nature of the duties performed is recognized and enforced, even when the duties are defined, and the executive officers created to perform the same by provisions in the charter, or organic act creating the municipal corporation, as well

as when the duties are imposed upon corporate officers by independent statutes.

In Maxmilian *vs.* Mayor, the servant by whose negligence the plaintiff was injured, was appointed by the Commissioners of Charities and Correction, corporate officers, to whom was intrusted the execution of the laws in relation to the relief of the poor sustained in the almshouses and hospitals, and in relation to criminals in custody in the public prisons.

Such Commissioners were, in the first instance, invested with power by an independent act, chapter 510 of the Laws of 1860, p. 1026.

At the time of the occurrence by which the plaintiff was injured, the Commissioners of Charities and Corrections had become a department of the City Government, under and pursuant to section 80, chapter 137 of the Laws of 1870, the City Charter, provided for, as such department, by specific provisions in the Charter of the City, authorized to exercise all the powers and duties defined by the Act of 1860.

The Court notices the creation of the Commissioners by the Act of 1860 and subsequent transformation into a department of the City Government, as follows:

> " By this act (the Act of 1860) that department
> " is created in the City and County of New York,
> " and it is declared that there shall be chief officers
> " thereof, and their name of office is designated
> " (sec. 1). They thereby have their appointment
> " from the Comptroller of the City and County,
> " though since then they are made a department of
> " the City and appointable by the Mayor (Laws of
> " 1870, chap. 137, p. 366, sections 29–30; p. 386,
> " sec. 80).

The Court further say:

> " The Commissioners of Charities and Correc-
> " tion are public officers, though getting their right
> " of office from a circumscribed locality; and the

"acts which they may do are to be done in their "capacity as public officers, in the discharge of "duties laid upon them by the law for the public "benefit, and far removed from acts done by city "or town, in its municipal character, in the man- "agement of its property for its own profit or "advantage. It is seen at once that the powers "and duties of the Commissioners of Charities and "Correction are not to be exercised and performed "for the especial benefit of the defendant, (the City "of New York). It gets no emolument therefrom, "nor any good as a corporation. It is the public, "or individuals as members of the community, "who are interested in the due exercise of these "powers and the proper performance of their "duties."

The analogy between the duties of the Commissioners of Charities and Correction and of the Fire Commissioners, as to the public, governmental character thereof, is complete; and the Fire Department, although an executive department of the City Government, still performs duties which pertain not to the emolument of the Corporation or its special benefit, and which pertain only to the public good and the performance of a public duty.

The Fire Department originated also by a system of laws similar to the laws by which the Department of Charities and Correction was created.

Prior to 1865 the extinguishment of fires was undertaken by volunteer associations, to which the municipality furnished apparatus, and by ordinances regulated, in some respects, the government thereof.

For the acts or negligence of such associations, their officers or members, when engaged in extinguishing fires, the Courts held that the Corporation was not liable.

O'Meara *vs.* The Mayor, 1 Daly, 425.

By chapter 249 of the Laws of 1865, page 395, the Metropolitan Fire District was established; the appointment of Commissioners provided for; an elaborate provision made for the government and discipline of the officers and members thereof; the duties defined, and provision made for the payment to the officers and members for service performed.

Subsequently by section 30, chapter 137, Laws of 1870, being the City Charter, a Fire Department was created in the City Government, and by section 1 of the same act, as amended by section 16 of chapter 574, Laws of 1871, the Municipal Fire Department was constituted, consisting of a board of five persons authorized to perform all the duties prescribed by the Act of 1865, in relation to the extinguishment of fires.

The Fire Department thus became a charter department, empowered and authorized to execute the State law in respect to a duty in which the City has no pecuniary or private interest, and in which the department is still to be regarded as the agent of the State Government, acting for the State in executing governmental power for the public and not for the corporate benefit.

The educational establishment of the City is another instance of a department created within the City Government, authorized to discharge duties not local or corporate, but related to and belonging to the administration of the State Government; which, although formally a department of the Municipal Government, is still, by the decision of the Court of Appeals, recognized as an administrative branch of the State Government, for which the City is not liable in damages in respect to negligence of an employee of the department.

Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

It therefore may be considered to be the established doctrine, that if the nature of the duty performed is

governmental, and not corporate, the City is exempt from liability for the negligence of an officer, agent, or servant appointed by it to execute such duty, even when the duty is cast upon a department or officer of the municipality, by specific provisions in the corporate charter.

III.

The duties of a fire department are governmental and not corporate, and consequently of the class upon which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

It is said in Dillon on Municipal Corporations, above quoted, that the distinction between corporate and governmental duties is well established, though difficult to trace. It is therefore proper to refer to the concrete cases in which the Courts have defined the distinction.

(*a*) It is well settled that the caring for public streets, keeping them in order for safe and convenient use, regulating, grading and paving them, is deemed to be a duty assumed by the corporation, in consideration of the privileges granted by its charter, performed for its corporate advantage, and therefore that liability in damages is cast upon the corporation, in case of negligence on the part of its officers, agents or servants in respect to the performance of such duties.

Maximilian *vs.* The Mayor, *supra.*
Bieling *vs.* City of Brooklyn, 120 N. Y. Rep., 106.
Ehrgott *vs.* The Mayor, 96 N. Y.
Rehberg *vs.* The Mayor, 91 N. Y. Rep., 144.
Hume *vs.* The Mayor, 74 N. Y. Rep., 264.

The duties performed by the Commissioners of Charities and Correction in support of the poor, and the confinement of prisoners under criminal charges, and the performance of duties connected with the maintenance of the school system have been distinctly defined by the Court, as falling within the class of governmental duties performed for the public and not corporate benefit, and no liability for negligence on the part of the officers, agents or servants employed therein is imputed.

Maximilian *vs.* The Mayor, 62 N. Y. Rep., 162.
Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

In respect to the extinguishment of fires, the decisions of the Courts in all the States agree in including that duty among the governmental functions performed by municipal corporations in behalf of the public, as to which the corporation is exempt from liability in damages for neglect of the officers, agents or servants employed therein.

In the American and English Encyclopædia of Law, volume 7, page 997, it is said :

> " The members of the fire department of a
> " municipality are public officers, and not the mere
> " servants of the municipality ; and, in the absence
> " of an express statute, the municipal corporation
> " is not liable for injuries occasioned by the negli-
> " gence of the members of its fire department in
> " performing their duties."

And this doctrine is supported by numerous cases cited.

The text books are emphatic and clear on the subject, and maintain the same doctrine.

Judge Dillon's well-known work has already been referred to.

In the latest book on the subject it is said:

> "Municipal corporations are not liable for the "negligence of their firemen—although they may "be appointed and removed by the city, and the "performance of duties are wholly subject to its "control."
>
> Tiedeman on Municipal Corporations. sec. 333*a*.

And another very recent work also says:

> "Members of a fire department, as officers "charged with a public service, are not the agents "or servants of the city which appoints them, and "the city is therefore not liable for their negligent "discharge of official duty, nor is it liable for "negligence in the performance of a public duty "imposed by law" upon its members.
>
> 1 Beach on Public Corporations, sec. 744.

And see also

> Jones on Negligence of Municipal Corporations, section 31.

After a careful search of the authorities, and after throwing aside a great number of decisions which relate to failure to supply water, and which, although bearing upon the question, are not absolutely in point, the following authorities will be found to sustain, without exception and under the varying circumstances therein discussed, the doctrine of the non-liability of a municipal corporation for the acts of its fire department.

And the attention of the Court is most earnestly called to the fact already pointed out, that in the decisions no distinction whatever is drawn between fire departments organized by a distinct and separate law of the State, and fire departments which are organized under a city charter, or which by the wording of the

statutes creating them, form an integral part of the administration of the City Government, although not specifically named in the City Charter.

The following are the principal cases, with a short memorandum of the facts under which they arose:

Hafford *vs.* New Bedford, 16 Gray, 297 (hose-carriage on way to fire running over person).

Fisher *vs.* Boston, 104 Mass., 87 (injuries from bursting hose).

Burrill *vs.* Augusta, 78 Me., 118 (frightening horse by escaping steam from engine left in street).

Wild *vs.* Patterson, 47 N. J. Law, 406 (injury arising from defect in brake of engine).

Hayes *vs.* Oshkosh, 33 Wis., 314 (fire caused by negligent management of engine, allowing escape of sparks, etc).

Kies *vs.* Erie City, 135 Pa. St., 144 (negligent arrangement of engine-house doors).

Wilcox *vs.* City of Chicago, 107 Ill., 334 (collision with hook-and-ladder wagon).

Edgerly *vs.* Concord, 59 N. H., 78 (negligent testing of hydrant).

Howard *vs.* San Francisco, 51 Cal., 52 (collision with engine).

McKenna *vs.* St. Louis, 6 Mo. App., 320 (negligent running of hose-carriage).

Jewett *vs.* New Haven, 38 Conn., 368 (negligent driving of hose-carriage).

Heller *vs.* Sedalia, 53 Mo., 159 (want of proper exertions to extinguish fire).

Grube *vs.* St. Paul, 34 Minn., 402 (careless driving of hose-carriage).

Wheeler *vs.* Cincinnati, 19 Ohio St., 19 (insufficient water and insufficient efforts to extinguish fire).

Brinkmeyer *vs.* Evansville, 29 Ind., 187 (insufficient water and engines out of repair).

Robinson *vs.* Evansville, 87 Ind., 334 (hose insufficient in length to reach fire).

Welsh *vs.* Rutland, 56 Vt., 228 (slipping on ice arising from water escaping from a fire-hydrant).

Greenwood *vs.* Louisville, 13 Bush, 226 Ky., (engine negligently running over person on sidewalk).

Freeman *vs.* Philadelphia, 7 W. N. C., Pa., 45 (injuries from careless driving of engine).

Knight *vs.* Philadelphia, 15 W. N. C., Pa., 307 (injuries from careless driving of fire-engine).

Dodge *vs.* Granger, 17 R I., 664; 24 Atl. Rep., 100 (negligent projection of ladder from engine-house).

Lawson *vs.* City of Seattle, 6 Wash., 184; 33 Pac. Rep., 347 (defective brace).

Gillespie *vs.* City of Lincoln, 35 Neb., 34; 52 N. W. Rep., 811 (killing by ladder-wagon).

Simon *vs.* Atlanta, 67 Ga., 618 (collision with rope stretched across street by municipality to allow parade of fire department).

In Hafford *vs.* New Bedford, 16 Gray, 297, already cited, it is said:

"The members of the Fire Department of New "Bedford, when acting in the discharge of their "duties, are not servants or agents in the employ- "ment of the city, for whose conduct the city can "be held liable; but they act rather as officers of "the City, charged with the performance of a cer-

" tain public duty or service, and no action will
" lie against the city for their negligence or im-
" proper conduct while acting in the discharge of
" their official duty."

In this case the members of the Fire Department were acting under a law which had been accepted by a popular vote of the citizens, and made a part of the organic law of the City, and the officers and members were paid from the City treasury for their services.

In Fisher *vs.* Boston, 104 Mass., 87, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of a hose attached to a fire-engine.

The Court say :

" It makes no difference whether the Legislature
" itself prescribes the duties of the officers
" charged with the repair and management of fire-
" engines, or delegates to the city or town, the
" definition of those duties by ordinance or by-
" law. However appointed or elected, such per-
" sons are public officers, who perform duties im-
" posed by the law for the benefit of all the
" citizens, the performance of which the city or
" town has no control over, and derives no benefit
" from, in its corporate capacity. The acts of such
" public officers are their own official acts, and not
" the acts of the municipal corporation or its
" agents."

In Jewett *vs.* New Haven, where the plaintiff was negligently run into and injured by the driver of a hose-cart, a member of the Fire Department, who was hastening to the engine-house to procure additional hose for use at a fire ; held, that the members of the Fire Department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the City, for whose negligence it can be held liable.

The Fire Department in this case was a paid fire department, organized under a law accepted by a popular vote of the citizens of the city, and made a part of the organic law of the municipality.

The quotation from the opinion of Chief Justice Butler, inserted by the learned Trial Judge in his opinion in the case at bar, is a quotation from a dissenting opinion, and while doubtless quoted by the Court Justice below as well expounding Judge Butler's views, yet defines the doctrine which was condemned by the decision in the case.

In Knight *vs.* Philadelphia, 15 W. N. C. (Pa.), 307, the Court says:

> "The members of the Fire Department are not "such servants of the Municipal Corporation as "to make it liable for their acts of negligence. "Their duties are of a public character and for a "high order of public benefit. The fact that the "act of Assembly did not make it obligatory on "the City to organize a Fire Department, does not "change the legal liability of the municipality for "the conduct of the members of the organization. "The same reason which exempts the City from "liability for the acts of its policemen applies "with equal force to the acts of its firemen."

In O'Meara *vs.* The Mayor, 1 Daly, 425, the Court says:

> "The powers exercised by the defendants in re- "ference to the Fire Department, are conferred "and employed exclusively for the public benefit, "not for purposes of private advantage and emolu- "ment, and this is an answer to the plaintiff's "claim."

The definition of the Court in relation to the nature of the powers exercised by those who extinguish fires as officers of the Fire Department, is equally applic-

able to the department, organized under the present laws, as it was to the volunteer department, which was organized, sustained, and supplied by the City, at the time when the last mentioned case was decided.

IV.

The contention of the defendants in this case does not controvert the doctrine laid down in Barnes vs. The City of Columbia, 91 U. S. Rep., 530.

The action in that case was brought to recover for damages sustained by the plaintiff in consequence of falling into an excavation in the street, negligently left there by the Commissioners authorized to improve the streets.

The duty performed by the Commissioners, in behalf of the municipality, was the duty of caring for streets, which, in all the cases in this State, and all other States, is held to be a duty performed for the corporate benefit, as to which a liability in damages arises, if the officers charged with executive powers in respect thereto are negligent in the performance of their duty.

The duty which was performed by the Commissioners was a corporate duty, distinguishable from the governmental duty of extinguishing fires, which is performed for the public, and not for the corporate advantage and benefit.

Defendants argue, therefore, that the foregoing authorities and the principles thereby illustrated sustains the following proposition:

1st. That the municipal corporation, through the Fire Department, exercises powers which are purely

governmental, for the public benefit; from which it derives no revenue or emolument as a corporation; therefore, that it is not liable for the consequence of the neglect of an agent necessarily employed by it, in the absence of express statute creating such liability.

The position of the defendants in relation to the performance of the duty of extinguishing fires, and its relation to the public, is closely illustrated by the case of Murphy *vs.* The Commissioners of Emigration, 28 N. Y. Rep., 142.

The Commissioners of Emigration were public governmental agents, exercising their powers for the public good and not for their individual advantage or emolument.

They were sued for the value of property lost by the neglect of their agents.

It was argued in their defence that they were representatives of the government transacting public business through agents; that the government, and consequently the Commissioners, is not liable for the neglect of the agents if necessarily employed in transacting public business.

Citing—

Story on Agency, sec. 319.
Story on Bailment, sec. 462.
Seymour *vs.* Van Slyck, 8 Wendell, 403 422.
United States *vs.* Kirkpatrick, 9 Wheaton, 735.
Whitfield *vs.* Lord de Spencer, Cowp., 342.

The Court says:

"The position of the defendants is distinguish-
"able from that of persons acting for their own
"benefit or employing others for their own benefit.
"They do not act for their own benefit or employ
"agents, clerks or servants for their own benefit,
"but for the benefit of the community at large."

Story on Agency, section 319, says:

> "The doctrine is now firmly established that "public officers and agents are not responsible for "the misfeasances or positive wrongs, or for the "nonfeasance or negligences of the servants and "other persons properly employed by and under "them, in the discharge of their special duties."

Upon the same principle, an action does not lie against the Postmaster-General for property lost in course of transmission through the mail.

Whitfield *vs.* Lord De Spencer, Cowp., 342.

The controversy in the case at bar is altogether similar to the contention that the City is liable for the negligence or neglect of policemen employed by it in the preservation of the public peace.

That such liability does not exist is well settled.

McKay *vs.* City of Buffalo, 9 Hun, 401; affirmed 74 N. Y. Rep., 619.

Nor is a City liable for the acts of its Board of Health.

Bamber *vs.* City of Rochester, 26 Hun, 587.

The doctrine of exemption from liability of municipal corporations for the neglect of police officers is now fixed beyond controversy; the similarity in the nature of the duty performed by policemen and by firemen is obvious; and that both perform governmental functions is obvious; and the principle which exempts the municipal corporation by which both policemen and firemen are appointed or employed, is equally applicable as to both policemen and firemen.

V.

The law, as laid down by the Courts of the State of New York, is positive and clear.

As has already been suggested hereinbefore, the decisions of the various States cited draw no distinction between liability for the acts of a fire department organized under a city charter, and fire departments organized under separate and special acts, but performing their functions within a specific area.

This is important in view of the evident stress laid by the learned Judge below upon the supposed distinction in the decisions of the State of New York between the powers of the New York City Fire Department as organized prior to, and as existing after the department became by statute a part of the administration of the City government.

The first case in this State has been already mentioned—O'Meara *vs.* The Mayor, 1 Daly, 425.

That case was decided under the law relating to the old fire department, and was before the union of the City and County of New York.

But the Court said that the members of the fire department of this City owe their allegiance to the City not as members of a corporation, but as members of an organization identified with the administration of the City government and forming a part of its protective police; that the powers exercised by the city corporation in reference to the fire department are conferred and employed exclusively for the public benefit, and the corporation cannot be held liable as a master for the wrongful acts of firemen.

The Court said, in reference to the duties of the firemen:

> "They are for the pecuniary benefit of the in-
> "habitants of the city as well as for their personal

" safety. They result in no benefit or advantage
" to the defendants other than to individuals, and
" then only when a loss or disaster is averted by
" their efforts. The powers exercised, therefore,
" by the defendants in reference to the fire depart-
" ment are conferred and employed exclusively
" for the public benefit, not for purposes of private
" advantage or emolument, and this is an answer
" to the plaintiff's claim (The Mayor, etc. *vs.*
" Bailey, 2 Denio, 433; Lloyd *vs.* The Mayor, etc.,
" 5 N. Y., 369; Griffin *vs.* The Mayor, etc., 9 N.
" Y., 456)."

In 1875 it was held that the City was not liable for the acts of the Metropolitan Fire Department, and the Court, after showing by its citation of authorities that it did not regard the fact as to whether or not the department was created under the City charter one of importance, said:

" In the management of the property and ap-
" paratus and in their acts put forth in the extin-
" guishment of fires, the firemen act not for the
" city corporation, but for the general public."

Woolbridge *vs.* The Mayor, 49 How. Pr., 67.

And a much later case decided under the present Consolidation Act, that is to say, *under the law as it stands to-day*, also held that *the present corporation* was not liable for the negligent action of the employees of the fire department while engaged in testing a fire tower prior to its purchase by the City for use in the said department.

This case was Thompson *vs.* The Mayor, 52 Super., 427, a case decided by the General Term of the Superior Court in 1885.

This case last cited is exactly in point.

In the Court of Appeals also, while there the exact question here under discussion has never been squarely passed upon), yet in a decision which has become a leading case as to *ultra vires* of municipal corporations (Smith *vs.* City of Rochester, 76 N. Y., 506), after stating that the Common Council of Rochester exceeded its powers in ordering a midnight parade of the Fire Department for the celebration of the Centennial, the Court added :

> " Assuming, however, that the Common Council, " in making an order for a midnight parade of the " fire department to celebrate the centennial anni- " versary of the nation, had authority under the " provisions last cited, the difficulty in maintaining " the plaintiff's action is **the well-settled rule " that a municipal corporation is not " liable for the negligence of firemen " while engaged in the line of their duty** " (Dillon on Municipal Corporations, sec. 774 ; Haf- " ford *vs.* New Bedford, 16 Gray, 297 ; Fisher *vs.* " Boston, 104 Mass., 87 ; Jewett *vs.* City of New " Haven, 38 Conn., 368 ; O'Meara *vs.* The Mayor, " 1 Daly, 425).
>
> " The exemption from liability in most of the " cases last cited is placed upon the ground that " *the service is performed by the corporation for the " public good in obedience to law in which it has no " particular interest, and from which it derives no " particular benefit in its corporate capacity ;* that " the members of the Fire Department are not the " agents and servants of the city for whose conduct " it is liable, but act as officers charged with a " public service for whose negligence in the dis- " charge of official duty no action lies against the " city, and a maxim of *respondeat superior* has no " application."
>
> Smith *vs.* City of Rochester, 76 N. Y., 513.

And in a later case, Terhune *vs.* The Mayor, etc., of the City of New York, 88 N. Y., 247, and which was decided long after the union of the City and County of New York, the Court of Appeals held that the Fire Commissioners of the City of New York are public officers, not agents of the City, and that for their acts in wrongfully removing an officer in the Fire Department the City is not liable.

These are all the cases upon the subject in the State of New York, and none of them have ever been questioned or distinguished.

It is, therefore, respectfully submitted that the law of the State of New York to-day is that the City of New York is not responsible for the wrongs of its Fire Department.

VI.

The judgment should be reversed with costs.

Dated New York, February 11, 1895.

FRANCIS M. SCOTT,
Counsel to the Corporation,
For the Mayor, Aldermen and Commonalty
of the City of New York, Respondents-
Appellants.

D. J. DEAN,
THEODORE CONNOLY,
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MARTIN B. BROWN, Printer and Stationer, Nos. 49 to 57 Park Place, N. Y.

( )

[REG. , FOL. .]

Schedule B.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

ROBERT W. WORKMAN,
Libelant and Appellee,

against

THE MAYOR, ALDERMEN and COMMONALTY OF THE CITY OF NEW YORK, and JAMES A. GALLAGHER,
Respondents and Appellants.
(Impleaded with the Fire Department of the City of New York.)

Brief in reply for the Respondent and Appellant The Mayor, Aldermen and Commonalty of the City of New York.

The brief served under the rules of this Court on behalf of the libellant and appellee is, we are glad to confess, a most learned and philosophical discussion of what the law might be; but we respectfully submit that the conclusions reached are altogether at variance with what the law actually is and has been, as settled by the courts for many years.

At page 2 of the brief of the appellee the position of the appellant, the Mayor, Aldermen and Commonalty

of the City of New York, is incorrectly stated. It is not now, and never was contended by the City of New York, that the Federal Courts have no jurisdiction to render a decree against the municipality, but the claim that is now made is that the municipality is not, in law, responsible for the acts of the agents and servants of the Fire Department of the City of New York. If the responsibility of the City for the acts of the agents and servants of the Fire Department has been denied by the State Courts, assuming that the question of law involved has been decided nowhere except in the State of New York, this Court will follow the law as so laid down.

In the case of Detroit *vs.* Osborne, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the Court, said, and quoting from the opinion in the case of Bucher *vs.* The Railroad Company, 125 U. S.:

> " It may be said generally that whenever the de-
> " cisions of the State Courts relate to some law of
> " a local character which may have become estab-
> " lished by those Courts, or has always been a
> " part of the law of the State, that the decisions
> " upon the subject are usually conclusive, and al-
> " ways entitled to the highest respect of the Fed-
> " eral Courts."

Detroit *vs.* Osborne, 135 U. S., 499.

And to the same effect Burgess *vs.* Seligman, 107 U S., 20; Clareborn *vs.* Brooks, 111 U. S., 400.

Counsel for the appellee is in error in assuming that the contention now made by the Mayor, Aldermen and Commonalty of the City of New York is made upon the assumption that the City of New York is entitled, at the hands of this Court, to any greater consideration in the application of what the learned counsel terms " common-law technicalities " than any other suitor.

The question is not one of legal technicality, but of principle, decided by the Courts of this State, and of many of the States in the Union upon what have been held to be grounds of sound public policy, and on the brief in chief this proposition is amply sustained by authority. We are not, however, limited to the discussion of the principle of no liability on the part of the City for the acts of the Fire Department to mere inference or argument that the law as laid down by the State Courts will be followed by the United States Courts.

In the case of Haight and another against The Mayor, Aldermen and Commonalty of the City of New York, decided by the learned Judge of the District Court in May, 1885, the general principle now contended for was approved, and the libel in that case dismissed.

In the opinion in that case Mr. Justice Brown said :

> "These facts bring the case, so far as I can see "entirely within the decision in the case of Max- "milian *vs.* The Mayor, 62 N. Y., 161, where the "responsibility of the corporation for the negli- "gent acts of persons in the employ of the De- "partment of Charities and Corrections is dis- "cussed by Folger, *C. J.*, with his usual fullness "and learning ; and the conclusion was there ar- "rived at, sustained by principle and authority, "that the corporation could not be held for the "negligent acts of the employees of that depart- "ment, because it is an independent board, over "which the corporation has no control, and which "does not act for the use or the benefit of the cor- "poration in the discharge of any of its corporate "functions or duties."
>
> Haight *vs.* The Mayor, 24 Fed. Rep., 93.

In the case of Edgerton *vs.* The Mayor, also decided by Mr. Justice Brown and in which the differences between the liability of the City for the acts of the

different departments were fully discussed, Mr. Justice Brown says:

> "I deem it unnecessary to consider here the "somewhat nice distinctions which have been "made in the several cases decided in the Court "of Appeals in this State as regards the liability "of a city corporation for the negligent acts of the "servants employed under its different heads of "departments as constituted by law. As respects "negligence by the employees of the Department "of Public Charities and Correction, of the *Fire* "*Department*, and of the Board of Education, it "has been adjudged that the corporation is not "liable. (Maxmilian *vs.* Mayor, etc., 62 N. Y., "166; Smith *vs.* City of Rochester, 76 N. Y., 506; "Ham *vs.* Mayor, etc., 70 N. Y.. 459. The first of "these cases was followed by this Court in the "case of Haight *vs.* Mayor, etc., 24 Fed. Rep., "93.
>
> Edgerton *vs.* The Mayor, 27 Fed. Rep., 232.

It would seem, then, as though the very proposition that is now under discussion had been decided by the Judge below as a principle of law in a manner at variance with the conclusions reached by the District Court in this cause.

This brief is filed in reply mainly to correct certain misapprehensions apparent in the brief filed by the appellee as to the contention made by The Mayor, etc., of the City of New York, and certain errors of fact as to the proposition that the question now under discussion had not been adjudicated in the Federal Courts.

Dated New York, March 9, 1895.

FRANCIS M. SCOTT,
Counsel to the Corporation,
Proctor for The Mayor, etc., of the City of New York.

DAVID J. DEAN,
THEODORE CONNOLY,
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Advocates.

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Brief of Scott for Appls.

[REG. 44, FOL. 446.]

Filed Apr. 2, 1897.

Supreme Court of the United States.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, *Appellants*,

against

ROBERT W. [illegible], *Appellee*.

JAMES A. GALLAGHER,

Supreme Court, U. S.
FILED
APR 2 1897
JAMES H. MCKENNEY,
CLERK.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari.

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[REG. 44, FOL. 448.]

Supreme Court of the United States.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,
Appellants,

against

ROBERT W. WORKMAN,
Appellee.

Certiorari to the United States Court of Appeals for the Second Circuit.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari.

This is a review by a writ of *certiorari* by libellant, Robert W. Workman, of the determination of the United States Circuit Court of Appeals for the Second Circuit, which reversed (Record, p. 133) a decree of the District Court for the Southern District of New York, which latter decree had been in favor of the libellant. The facts as disclosed by the record are as follows:

The appeal by libellant to the United States Circuit Court of Appeals was from a decree of the District Court awarding the libellant and appellee the

sum of $815.84 as damages, interest and costs, against the Mayor, Aldermen and Commonalty of the City of New York and against James A. Gallagher, pilot of the fire-boat "New York."

On Sunday the 11th day of June, 1893, the barkentine "Linda Park" was lying on the easterly side of Pier 48, East river, and moored a sufficient distance in toward the bulkhead, with her bow pointing toward the river, to allow of a schooner's being moored to the same pier with *her* bow *in* toward the bulkhead, allowing a space of some 6 feet between the ends of the respective bowsprits (Record, pp. 9, 38), and alongside of the barkentine "Linda Park" lay a barge with a beam of from 30 to 35 feet (Record, p. 38). On the opposite pier and on the westerly side of Pier 49 was a covered railroad barge with a beam of some 40 feet (Record, p. 39).

By reference to a diagram in the case, the respective dimensions of the piers and bulkhead and the extent of the open water between Piers 48 and 49 will appear as follows: The width of the bulkhead between the piers is shown to be 129 feet, and 54 inches; the length of Pier 48 is shown to be 329 feet and 58 inches; and the length of Pier 49, 324 feet and 99 inches; and the clear water between the piers at the extreme ends upon the river front, 126 feet and 42 inches.

Allowing for the closing of the clear water between the extreme ends of Piers 48 and 49, by the width of the barge at 40 feet, lying practically at the end of Pier 49, alongside the pier, and the width of the schooner lying practically at the extreme end of Pier 48 at 30 feet, the 126 feet and 42 inches of clear water is reduced by 70 feet, leaving 56 feet and 42 inches of clear water between Piers 48 and 49.

Some time between 3 and 4 o'clock Sunday afternoon, June 11, a fire broke out at the corner of Clinton street,

and both the fire-boats "New Yorker" and "Havemeyer" were summoned by telegraph to the scene. At the time the tide was running strong flood and the "Havemeyer" (known as Engine Company No. 43) coming down the East river and against the tide, from her station at the foot of Grand street, running in between Piers 48 and 49, made fast to the proper place at the bulkhead, and commenced to play upon the fire (see Record, pp. 54 and 55).

The "New Yorker," a larger and heavier boat, summoned from her station, Pier 1, North river, coming up with the tide and attempting to enter the slip, was caught by the eddy between the piers and swept against the "Linda Park." At the time the "New Yorker" reached the slip, according to the testimony of the libelant's witnesses, the fire had been under way some 20 or 30 minutes and was then blazing (see Record, p. 53, fol. 210).

For the injury done to the barkentine, on the 27th day of July, 1893, a libel was filed against the Mayor, Aldermen, and Commonalty of the City of New York as sole respondents. On the 8th day of August, 1893, an answer was interposed by the Mayor, Aldermen and Commonalty, defending both upon the merits and upon the law, upon the ground that they were not responsible for any acts of negligence committed by the servants and employees of the Fire Department (see Record, pp. 3–11).

This case having been on the calendar of the District Court for a number of days and answered "ready," the respondents, the Mayor, Aldermen and Commonalty of the City of New York, on the 9th day of November, 1893, were ordered to show cause why the libel should not be amended by making the Board of Fire Commissioners of the City of New York and the captain of

the fireboat "New Yorker" parties defendant therein (Record, p. 3).

The motion to amend the libel coming on to be heard before the District Judge on November 10, 1893, the District Judge allowed the amendment prayed for and allowed the respondent to bring in both the Fire Department and the defendant Gallagher, but upon the ground that

> "The authorities cited in the defendants' brief "make it apparently very doubtful whether the "libelant can recover against the City for the "faults of the Fire Department, however clear the "fault of the 'New Yorker' may be" (see Record, "page 15).

Upon the order entered upon that decision of December 1, an amended libel was filed against the Mayor, Aldermen and Commonalty of the City of New York, against the Fire Department of the City of New York and James A. Gallagher, the pilot (see Record, p. 17).

On the 12th the defendant Gallagher filed his answer defending upon the merits (see Record, pp. 21-27.) The respondent, the Fire Department, excepted to the libel for want of sufficiency, in that the amended libel failed to allege in what capacity the Fire Department of the City of New York was sued, and failed also to allege whether the Fire Department of the City of New York was a corporation, foreign or domestic, and because also there was no negligence charged in the amended libel against the Fire Department (see Record, p. 28).

These exceptions coming on to be heard on the 27th day of December, 1893, the District Court entered an order sustaining certain of the exceptions as therein re-

cited (see Record, p. 29), and thereafter an amendment to the amended libel was filed (see Record, p. 31), and thereafter the Fire Department answered (see Record, pp. 32-35), and the questions involved were at issue between all the parties of the record.

The case came on to be heard before the Judge of the District Court on the 9th day of April (see Record, p. 36), and thereafter the District Court decreed that the libel be dismissed as against the Fire Department of the City of New York, but rendered a decree against both the Mayor, Aldermen and Commonalty of the City of New York and against James A. Gallagher, the pilot.

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit this decree of the District Court was reversed, except as to the provisions thereof relating to the Fire Department of the City of New York, and as to the appellant James A. Gallagher, and as to said James A. Gallagher the decree of said District Court was affirmed with costs.

An application was made to the Circuit Court of Appeals upon petition that the questions in the case be certified to this Court (Record, pp. 135-137). This application was denied, and the case is now brought here upon a writ of certiorari (Record, p. 139).

In support of the determination of the Circuit Court of Appeals the respondent respectfully submit the following:

POINTS.

I.

The Mayor, Aldermen and Commonalty of the City of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the Commissioners of the Fire Department in the performance of their public duties.

This exemption from liability springs from the nature of the duty performed by the officers and members of the Fire Department.

The extinguishment of fires is undertaken as a public or governmental duty, imposed for the public or general benefit, and from which the Corporation derives no corporate benefit or emolument.

The distinction between the powers and duties of municipal corporations from which corporate emolument is derived and those functions which are purely governmental, performed for the public good, from which no benefit or revenue comes to the Corporation, is made the test of liability for the consequence of neglect on the part of the agents necessarily employed by the Corporation.

In Dillon on Municipal Corporations, vol. 1, p. 107, 4th ed., it is said, concerning municipal corporations, that they "possess a double character; the one gov-"ernmental, legislative, or public; the other in a sense "proprietary or private.

"The distinction between these, though sometimes "difficult to trace, is highly important and is frequently "referred to, particularly in the cases relating to the

"implied or common-law liability of municipal cor-
"porations for the negligence of their servants, agents,
"or officers in the execution of corporate duties and
"powers."

Dillon on Municipal Corporations, 4th ed., vol. 2, page 1180, section 966, further says that municipal corporations are "considered to be impliedly liable (un-
"less the legislation negatives such liability) for wrong-
"ful acts done in what is termed their private or cor-
"porate character from which they derive some special
"or immediate advantage or emolument, but not as to
"such acts done in their public capacity as governing
"agencies in the discharge of duties imposed for the
"public or general (not corporate) benefit."

The following cases are cited in support of the doctrine thus defined:

Oliver *vs.* Worcester, 102 Mass., 489.
Richmond *vs.* Long's Adm., 17 Gratt., 375.
Petersburg *vs.* Applegarth, 28 Gratt., 321.
Western Savings Fund Society *vs.* Philadelphia, 31 Pa. St., 175, 189.
Bailey *vs.* The Mayor, 3 Hill, 531.
Maximilian *vs.* The Mayor, 62 N. Y., 160.

The following is quoted from Oliver *vs.* Worcester, 102 Mass., 489:

"The distinction is well established between the
"responsibilities of towns and cities for acts done
"in their public capacity in the dischage of duties
"imposed on them by the Legislature for the pub-
"lic benefit, and for acts done in what may be
"called their private character, in the management
"of property and rights voluntarily held by them
"for their own profit and advantage as a corpora-

" tion, although inuring ultimately to the benefit
" of the public."

In Bailey *vs.* The Mayor, 3 Hill, 531, the distinction between the public and private capacity of municipal corporations is maintained by Chief Justice Nelson. He says, in relation to municipal powers:

" If granted for public purposes exclusively they
" belong to the corporate body in its public politi-
" cal or municipal character. But if the grant was
" for the purposes of private advantage and emolu-
" ment, though the public may derive a common
" benefit therefrom, the corporation, *quoad hoc*, is
" to be regarded as a private company."

And from such considerations the question of liability in the case was determined.

In the same case, 2 Denio, 433, the same distinction between governmental duties exercised for public benefit, and the duties through which the corporation derives benefit for itself is maintained, and the exemption contended for in the case at bar recognized, as follows:

" On the other hand, where such corporation is
" bound to appoint an officer for the performance
" of a public duty it is not liable " (p. 446).

In Maximilian *vs.* The Mayor, 62 N. Y. Rep., the Court of Appeals say:

" There are two kinds of duties which are im-
" posed upon a municipal corporation: One is of
" that kind which arises from the grant of a
" special power, in the exercise of which the
" municipality is as a legal individual; the other
" is of that kind which arises, or is implied, from
" the use of political rights under the general law,
" in the exercise of which it is as a sovereign. The

" former power is private, and is used for private " purposes; the latter is public and is used for " public purposes (Lloyd *vs.* The Mayor, 5 N. Y., " 374). The former is not held by the munici- " pality as one of the political divisions of the " State; the latter is. In the exercise of the for- " mer power, and under the duty to the public " which the acceptance and use of the power in- " volves, a municipality is like a private corpora- " tion, and is liable for a failure to use its power " well, or for an injury caused by using it badly. " But where the power is intrusted to it as one of " the political divisions of the State, and is con- " ferred, not for the *immediate* benefit of the mu- " nicipality, but as a means to the exercise of the " sovereign power for the benefit of all citizens, the " corporation is not liable for nonuser, nor for " misuser by the public agents (Eastman *vs.* " Meredith, 35 N. H., 284).

" Where the duties which are imposed upon " municipalities are of the latter class, they are " generally to be performed by officers who, " though deriving their appointment from the " corporation itself, through the nomination of " some of its executive agents, by a power de- " volved thereon as a convenient mode of exer- " cising a function of government, are yet the " officers, and hence the servants, of the public " at large. They have powers and perform duties " for the benefit of all the citizens, and are not " under the control of the municipality, which has " no benefit, in its corporate capacity, from the per- " formance thereof. They are not then the agents " or servants of the municipal corporation, but " are public officers, agents or servants of the " public at large, and the corporation is not re- " sponsible for their acts or omissions, nor for the

" acts or omissions of the subordinates by them
" appointed (Fisher *vs.* Boston, 104 Mass., 87).
" And where a municipal corporation elects or
" appoints an officer, in obedience to an act of the
" legislature, to perform a public service, in which
" the corporation has no private interest, and from
" which it derives no special benefit or advantage
" in its corporate capacity such officer cannot be
" regarded as a servant or agent of the munici-
" pality, *for whose negligence or want of skill it can*
" *be held liable.*"

" It has appointed or elected him, in pursuance
" of a duty laid upon it by law, for the general
" welfare of the inhabitants or of the community."

In the same case the Court further says :

" Where it (the City) authorizes a use of its cor-
" porate property which use itself makes that
" property harmful to others, it is liable. Such is
" understood to be one of the grounds on which
" went Bailey *vs.* The Mayor (2 Denio, 433). And
" the duty of keeping in repair streets, bridges, and
" other common ways of passage, and sewers, and
" a liability for a neglect to perform that duty rests
" upon an express or implied acceptance of the
" power and an agreement so to do. It is a duty
" with which the City is charged for its own cor-
" porate benefit, to be performed by its own agents
" as its own corporate act (Conrad *vs.* Trustees of
" Ithaca, 16 N. Y., 158). It is not always easy to
" say within which class a particular case should
" be placed. But when it is determined that the
" power and duty are given and taken for the ben-
" efit of the corporation as a corporate body
" and the act to be done is to be done by it
" through agents of its appointment and under
" its control and power of removal, there is no

"doubt of its liability for negligent omission or "negligent attempt at performance. When the "powers created and duly enjoined are given, and "laid upon officers to be named by the corporation, "but for the public benefit and as a convenient "method of exercising a function of general gov- "ernment, and the corporation has no immediate "control nor immediate power of removal of those "officers, nor of their subordinates and servants, "then it is not liable for their negligent omission "or action."

The doctrine of Maximilian *vs.* The Mayor has been repeatedly reaffirmed and enforced by the Court of Appeals of the State of New York in subsequent cases.

In Bieling *vs.* The City of Brooklyn, 120 N. Y. Rep., p. 98, where there was a recovery for damages sustained in consequence of the fall of a wooden awning in a street of the city, the Court says :

"The municipality can perform its functions "only through officers or agencies. For the dis- "charge of those powers of a governmental or "political character, which are vested by the "statute in officers, and those duties not placed "upon it but upon officers or departments created "and vested with powers for public purposes, as "distinguished from those for the purposes of the "corporation, it is not responsible for their mis- "conduct or neglect, to individuals suffering dam- "ages as the result of it (Lloyd *vs.* Mayor, etc., 5 "N. Y., 374 ; Maximilian *vs.* Mayor, etc., 62 *id.*, "160 ; Ham *vs.* Mayor, etc., 70 *id.*, 459 ; Smith *vs.* "City of Rochester, 76 *id.*, 506).

"There are various duties which are legitimately "those of the corporation, amongst which is that "of taking care of the streets within it. To keep

"them in safe condition for public use was a "primary duty resting upon the City of Brooklyn."

The same principle has been adjudicated in other States.

In Mead *vs.* New Haven, 40 Conn., 72, where a City, under power given by its charter, appointed an inspector of steam boilers within the City, and by by-law imposed a penalty on any person who should use such a boiler without having it tested by the inspector, it was held that the City was not liable for negligence of the inspector in the discharge of his duty.

The Court says:

"The duty of inspection of boilers is govern- "mental. The object of the inspection is to pro- "tect all citizens from danger, who may come in "contact with the boiler, or may be exposed in "any way to danger from its unsafe condition. "The City, as such, has no pecuniary or individual "or private interest in the matter, and although "the power of the City over the subject is con- "ferred by the charter, and not by the general "law, yet the City must, we think, be regarded as "the agent of the government, and, acting for the "State, and not for itself, in making the appoint- "ment of inspectors, and therefore not liable for "the inspector's negligence."

See also—

Brown *vs.* Vinalhaven, 65 Maine, 402.
Mitchell *vs.* Rockland, 52 Maine, 118.

II.

This exemption from liability growing out of the nature of the duties performed is recognized and enforced, even when the duties are defined, and the executive officers created to perform the same by provisions in the charter, or organic act creating the municipal corporation, as well as when the duties are imposed upon corporate officers by independent statutes.

In Maxmilian *vs.* Mayor, the servant by whose negligence the plaintiff was injured, was appointed by the Commissioners of Charities and Correction, corporate officers, to whom was intrusted the execution of the laws in relation to the relief of the poor sustained in the almshouses and hospitals, and in relation to criminals in custody in the public prisons.

Such Commissioners were, in the first instance, invested with power by an independent act, chapter 510 of the Laws of 1860, p. 1026.

At the time of the occurrence by which the plaintiff was injured, the Commissioners of Charities and Correction had become a department of the City Government, under and pursuant to section 80, chapter 137 of the Laws of 1870, the City Charter, provided for, as such department, by specific provisions in the Charter of the City, authorized to exercise all the powers and duties defined by the Act of 1860.

The Court notices the creation of the Commissioners by the Act of 1860 and subsequent transformation into a department of the City Government, as follows:

> "By this act (the Act of 1860) that department
> "is created in the City and County of New York,
> "and it is declared that there shall be chief officers

"thereof, and their name of office is designated "(sec. 1). They thereby have their appointment "from the Comptroller of the City and County, "though since then they are made a department of "the City and appointable by the Mayor (Laws of "1870, chap. 137, p. 366, sections 29–30; p. 386, "sec. 80).

The Court further say:

"The Commissioners of Charities and Correc- "tion are public officers, though getting their right "of office from a circumscribed locality; and the "acts which they may do are to be done in their "capacity as public officers, in the discharge of "duties laid upon them by the law for the public "benefit, and far removed from acts done by city "or town, in its municipal character, in the man- "agement of its property for its own profit or "advantage. It is seen at once that the powers "and duties of the Commissioners of Charities and "Correction are not to be exercised and performed "for the especial benefit of the defendant (the City "of New York). It gets no emolument therefrom, "nor any good as a corporation. It is the public, "or individuals as members of the community, "who are interested in the due exercise of these "powers and the proper performance of their "duties."

The analogy between the duties of the Commissioners of Charities and Correction and of the Fire Commissioners, as to the public, governmental character thereof, is complete; and the Fire Department, although an executive department of the City Government, still performs duties which pertain not to the emolument of the Corporation or its special benefit, and which pertain only to the public good and the performance of a public duty.

The Fire Department originated also by a system of laws similar to the laws by which the Department of Charities and Correction was created.

Prior to 1865 the extinguishment of fires was undertaken by volunteer associations, to which the municipality furnished apparatus, and by ordinances regulated, in some respects, the government thereof.

For the acts or negligence of such associations, their officers or members, when engaged in extinguishing fires, the Courts held that the Corporation was not liable.

O'Meara *vs.* The Mayor, 1 Daly, 425.

By chapter 249 of the Laws of 1865, page 395, the Metropolitan Fire District was established; the appointment of Commissioners provided for; an elaborate provision made for the government and discipline of the officers and members thereof; the duties defined, and provision made for the payment to the officers and members for service performed.

Subsequently by section 30, chapter 137, Laws of 1870, being the City Charter, a Fire Department was created in the City Government, and by section 1 of the same act, as amended by section 16 of chapter 574, Laws of 1871, the Municipal Fire Department was constituted, consisting of a board of five persons authorized to perform all the duties prescribed by the Act of 1865, in relation to the extinguishment of fires.

The Fire Department thus became a charter department, empowered and authorized to execute the State law in respect to a duty in which the City has no pecuniary or private interest, and in which the department is still to be regarded as the agent of the State Government, acting for the State in executing governmental power for the public and not for the corporate benefit.

The educational establishment of the City is another instance of a department created within the City Government, authorized to discharge duties not local or corporate, but related to and belonging to the administration of the State Government; which, although formally a department of the Municipal Government, is still, by the decision of the Court of Appeals, recognized as an administrative branch of the State Government, for which the City is not liable in damages in respect to negligence of an employee of the department.

Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

It therefore may be considered to be the established doctrine, that if the nature of the duty performed is governmental and not corporate, the City is exempt from liability for the negligence of an officer, agent or servant appointed by it to execute such duty, even when the duty is cast upon a department or officer of the municipality, by specific provisions in the corporate charter.

III.

The duties of a fire department are governmental and not corporate, and consequently of the class upon which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

It is said in Dillon on Municipal Corporations, above quoted, that the distinction between corporate and governmental duties is well established, though difficult to trace. It is therefore proper to refer to the concrete cases in which the Courts have defined the distinction.

(*a*) It is well settled that the caring for public streets, keeping them in order for safe and convenient use, regulating, grading and paving them, is deemed to be a duty assumed by the corporation, in consideration of the privileges granted by its charter, performed for its corporate advantage, and therefore that liability in damages is cast upon the corporation, in case of negligence on the part of its officers, agents or servants in respect to the performance of such duties.

Maximilian *vs.* The Mayor, *supra.*
Bieling *vs.* City of Brooklyn, 120 N. Y. Rep., 106.
Ehrgott *vs.* The Mayor, 96 N. Y.
Rehberg *vs.* The Mayor, 91 N. Y. Rep., 144.
Hume *vs.* The Mayor, 74 N. Y. Rep., 264.

The duties performed by the Commissioners of Charities and Correction in support of the poor, and the confinement of prisoners under criminal charges, and the performance of duties connected with the maintenance of the school system have been distinctly defined by the Court, as falling within the class of governmental duties performed for the public and not corporate benefit, and no liability for negligence on the part of the officers, agents or servants employed therein is imputed.

Maximilian *vs.* The Mayor, 62 N. Y. Rep., 162.
Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

In respect to the extinguishment of fires, the decisions of the Courts in all the States agree in including that duty among the governmental functions performed by municipal corporations in behalf of the public, as to which the corporation is exempt from liability in damages for neglect of the officers, agents or servants employed therein.

In the American and English Encyclopædia of Law, volume 7, page 997, it is said:

> "The members of the fire department of a "municipality are public officers, and not the mere "servants of the municipality; and, in the absence "of an express statute, the municipal corporation "is not liable for injuries occasioned by the negli- "gence of the members of its fire department in "performing their duties."

And this doctrine is supported by numerous cases cited.

The text books are emphatic and clear on the subject, and maintain the same doctrine.

Judge Dillon's well-known work has already been referred to.

In the latest book on the subject it is said:

> "Municipal corporations are not liable for the "negligence of their firemen—although they may "be appointed and removed by the city, and the "performance of duties are wholly subject to its "control."
>
> Tiedeman on Municipal Corporations, sec. 333*a*.

And another very recent work also says:

> "Members of a fire department, as officers "charged with a public service, are not the agents "or servants of the city which appoints them, and "the city is therefore not liable for their negligent "discharge of official duty, nor is it liable for neg- "ligence in the performance of a public duty im- "posed by law" upon its members.
>
> 1 Beach on Public Corporations, sec. 744.

And see also

Jones on Negligence of Municipal Corporations, sec. 31.

After a careful search of the authorities, and after throwing aside a great number of decisions which relate to failure to supply water, and which, although bearing upon the question, are not absolutely in point, the following authorities will be found to sustain, without exception and under the varying circumstances therein discussed, the doctrine of the non-liability of a municipal corporation for the acts of its fire department.

And the attention of the Court is most earnestly called to the fact already pointed out, that in the decisions no distinction whatever is drawn between fire departments organized by a distinct and separate law of the State, and fire departments which are organized under a city charter, or which by the wording of the statutes creating them, form an integral part of the administration of the City Government, although not specifically named in the City Charter.

The following are the principal cases, with a short memorandum of the facts under which they arose:

Hafford *vs.* New Bedford, 16 Gray, 297 (hose-carriage on way to fire running over person).

Fisher *vs.* Boston, 104 Mass., 87 (injuries from bursting hose).

Burrill *vs.* Augusta, 78 Me., 118 (frightening horse by escaping steam from engine left in street).

Wild *vs.* Patterson, 47 N. J. Law, 406 (injury arising from defect in brake of engine).

Hayes *vs.* Oshkosh, 33 Wis., 314 (fire caused by negligent management of engine, allowing escape of sparks, etc).

Kies *vs.* Erie City, 135 Pa. St., 144 (negligent arrangement of engine-house doors).

Wilcox *vs.* City of Chicago, 107 Ill., 334 (collision with hook-and-ladder wagon).

Edgerly *vs.* Concord, 59 N. H., 78 (negligent testing of hydrant).

Howard *vs.* San Francisco, 51 Cal., 52 (collision with engine).

McKenna *vs.* St. Louis, 6 Mo. App., 320 (negligent running of hose-carriage).

Jewett *vs.* New Haven, 38 Conn., 368 (negligent driving of hose-carriage).

Heller *vs.* Sedalia, 53 Mo., 159 (want of proper exertions to extinguish fire).

Grube *vs.* St. Paul, 34 Minn., 402 (careless driving of hose-carriage).

Wheeler *vs.* Cincinnati, 19 Ohio St., 19 (insufficient water and insufficient efforts to extinguish fire).

Brinkmeyer *vs.* Evansville, 29 Ind., 187 (insufficient water and engines out of repair).

Robinson *vs.* Evansville, 87 Ind., 334 (hose insufficient in length to reach fire).

Welsh *vs.* Rutland, 56 Vt., 228 (slipping on ice arising from water escaping from a fire-hydrant).

Greenwood *vs.* Louisville, 13 Bush, 226 Ky. (engine negligently running over person on sidewalk).

Freeman *vs.* Philadelphia, 7 W. N. C., Pa., 45 (injuries from careless driving of engine).

Knight *vs.* Philadelphia, 15 W. N. C. Pa., 307 (injuries from careless driving of fire-engine).

Dodge *vs.* Granger, 17 R. I., 664; 24 Atl. Rep., 100 (negligent projection of ladder from engine-house).

Lawson *vs.* City of Seattle, 6 Wash., 184; 33 Pac. Rep., 347 (defective brace).

Gillespie *vs.* City of Lincoln, 35 Neb., 34; 52 N. W. Rep., 811 (killing by ladder-wagon).

Simon *vs.* Atlanta, 67 Ga., 618 (collision with rope stretched across street by municipality to allow parade of Fire Department).

In Hafford *vs.* New Bedford, 16 Gray, 297, already cited, it is said:

> "The members of the Fire Department of New "Bedford, when acting in the discharge of their "duties, are not servants or agents in the employ- "ment of the city, for whose conduct the city can "be held liable; but they act rather as officers of "the city, charged with the performance of a cer- "tain public duty or service, and no action will "lie against the city for their negligence or im- "proper conduct while acting in the discharge of "their official duty."

In this case the members of the Fire Department were acting under a law which had been accepted by a popular vote of the citizens, and made a part of the organic law of the City, and the officers and members were paid from the City treasury for their services.

In Fisher *vs.* Boston, 104 Mass., 87, the City was held not to be liable for a personal injury to the plain-

tiff caused by the bursting of a hose attached to a fire engine.

The Court say:

> "It makes no difference whether the Legislature "itself prescribes the duties of the officers "charged with the repair and management of fire-"engines, or delegates to the city or town, the "definition of those duties by ordinance or by-"law. However appointed or elected, such per-"sons are public officers, who perform duties im-"posed by the law for the benefit of all the "citizens, the performance of which the city or "town has no control over, and derives no benefit "from, in its corporate capacity. The acts of such "public officers are their own official acts, and not "the acts of the municipal corporation or its "agents."

In Jewett *vs.* New Haven, 38 Conn.. 368, where the plaintiff was negligently run into and injured by the driver of a hose-cart, a member of the Fire Department, who was hastening to the engine-house to procure additional hose for use at a fire; held, that the members of the Fire Department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the City, for whose negligence it can be held liable.

The Fire Department in this case was a paid fire department, organized under a law accepted by a popular vote of the citizens of the city, and made a part of the organic law of the municipality.

The quotation from the opinion of Chief Justice Butler, inserted by the learned Trial Judge in his opinion in the case at bar, is a quotation from a dissenting opinion, and while doubtless quoted by the

Court Justice below as well expounding Judge Butler's views, yet defines the doctrine which was condemned by the decision in the case.

In Knight *vs.* Philadelphia, 15 W. N. C. (Pa.) 307, the Court says:

> "The members of the Fire Department are not "such servants of the Municipal Corporation as "to make it liable for their acts of negligence. "Their duties are of a public character and for a "high order of public benefit. The fact that the "act of Assembly did not make it obligatory on "the City to organize a Fire Department, does not "change the legal liability of the municipality for "the conduct of the members of the organization. "The same reason which exempts the City from "liability for the acts of its policemen applies "with equal force to the acts of its firemen."

In O'Meara *vs.* The Mayor, 1 Daly, 425, the Court says:

> "The powers exercised by the defendants in re- "ference to the Fire Department, are conferred "and employed exclusively for the public benefit, "not for purposes of private advantage and emol- "ument, and this is an answer to the plaintiff's "claim."

The definition of the Court in relation to the nature of the powers exercised by those who extinguish fires as officers of the Fire Department, is equally applicable to the department, organized under the present laws, as it was to the volunteer department, which was organized, sustained, and supplied by the City, at the time when the last mentioned case was decided.

IV.

The contention of the defendants in this case does not controvert the doctrine laid down in Barnes vs. The City of Columbia, 91 U. S. Rep., 530.

The action in that case was brought to recover for damages sustained by the plaintiff in consequence of falling into an excavation in the street, negligently left there by the Commissioners authorized to improve the streets.

The duty performed by the Commissioners, in behalf of the municipality, was the duty of caring for streets, which, in all the cases in this State, and all other States, is held to be a duty performed for the corporate benefit, as to which a liability in damages arises, if the officers charged with executive powers in respect thereto are negligent in the performance of their duty.

The duty which was performed by the Commissioners was a corporate duty, distinguishable from the governmental duty of extinguishing fires, which is performed for the public, and not for the corporate advantage and benefit.

Respondents argue, therefore, that the foregoing authorities and the principles thereby illustrated sustains the following proposition:

1st. That the municipal corporation, through the Fire Department, exercises powers which are purely governmental, for the public benefit; from which it derives no revenue or emolument as a corporation; therefore, that it is not liable for the consequence of the neglect of an agent necessarily employed by it, in the absence of express statute creating such liability.

The position of the defendants in relation to the performance of the duty of extinguishing fires, and its relation to the public, is clearly illustrated by the case of Murphy *vs.* The Commissioners of Emigration, 28 N. Y. Rep., 142.

The Commissioners of Emigration were public governmental agents, exercising their powers for the public good and not for their individual advantage or emolument.

They were sued for the value of property lost by the neglect of their agents.

It was argued in their defense that they were representatives of the government transacting public business through agents; that the government, and consequently the Commissioners, is not liable for the neglect of the agents if necessarily employed in transacting public business.

Citing—

Story on Agency, sec. 319.
Story on Bailment, sec. 462.
Seymour *vs.* Van Slyck, 8 Wendell 403 422.
United States *vs.* Kirkpatrick, 9 Wheaton, 435.
Whitfield *vs.* Lord de Spencer, Cowp., 342.

The Court says:

"The position of the defendants is distinguish-
" able from that of persons acting for their own
" benefit or employing others for their own benefit.
" They do not act for their own benefit or employ
" agents, clerks or servants for their own benefit,
" but for the benefit of the community at large."

Story on Agency, section 319, says :

> " The doctrine is now firmly established that
> " public officers and agents are not responsible for
> " the misfeasances or positive wrongs, or for the
> " nonfeasance or negligences of the servants and
> " other persons properly employed by and under
> " them, in the discharge of their special duties."

Upon the same principle, an action does not lie against the Postmaster-General for property lost in course of transmission through the mail.

> Whitfield *vs.* Lord De Spencer, Cowp., 342.

The controversy in the case at bar is altogether similar to the contention that the City is liable for the negligence or neglect of policemen employed by it in the preservation of the public peace.

That such liability does not exist is well settled.

> McKay *vs.* City of Buffalo, 9 Hun, 401; affirmed, 74 N. Y. Rep., 619.

Nor is a City liable for the acts of its Board of Health.

> Bamber *vs.* City of Rochester, 26 Hun, 587.

The doctrine of exemption from liability of municipal corporations for the neglect of police officers is now fixed beyond controversy ; the similarity in the nature of the duty performed by policemen and by firemen is obvious ; and that both perform governmental functions is obvious ; and the principle which exempts the municipal corporation by which both policemen and firemen are appointed or employed, is equally applicable as to both policemen and firemen.

V.

The law, as laid down by the Courts of the State of New York, is positive and clear.

As has already been suggested hereinbefore, the decisions of the various States cited draw no distinction between liability for the acts of a fire department organized under a city charter, and fire departments organized under separate and special acts, but performing their functions within a specific area.

This is important in view of the evident stress laid by the trial judge below upon the supposed distinction in the decisions of the State of New York between the powers of the New York City Fire Department as organized prior to, and as existing after the department became by statute a part of the administration of the City government.

The first case in the State has been already mentioned—O'Meara *vs.* The Mayor, 1 Daly, 425.

That case was decided under the law relating to the old fire department, and was before the union of the City and County of New York.

But the Court said that the members of the fire department of this city owe their allegience to the City not as members of a corporation, but as members of an organization identified with the administration of the City government and forming a part of its protective police; that the powers exercised by the city corporation in reference to the fire department are conferred and employed exclusively for the public benefit, and the corporation cannot be held liable as a master for the wrongful acts of firemen.

The Court said, in reference to the duties of the firemen:

> "They are for the pecuniary benefit of the inhabitants of the city as well as for their personal safety. They result in no benefit or advantage to the defendants other than to individuals, and then only when a loss or disaster is averted by their efforts. The powers exercised, therefore, by the defendants in reference to the fire department are conferred and employed exclusively for the public benefit, not for purposes of private advantage or emolument, and this is the answer to the plaintiff's claim (The Mayor, etc. *vs.* Bailey, 2 Denio, 433; Lloyd *vs.* The Mayor, etc., 5 N. Y., 369; Griffin *vs.* The Mayor, etc., 9 N. Y., 456)."

In 1875 it was held that the City was not liable for the acts of the Metropolitan Fire Department, and the Court, after showing by its citation of authorities that it did not regard the fact as to whether or nor the department was created under the City charter one of importance, said:

> "In the management of the property and apparatus and in their acts put forth in the extinguishment of fires, the firemen act not for the city corporation, but for the general public."
>
> Woolbridge *vs.* The Mayor, 49 How. Pr., 67.

And a much later case decided under the present Consolidation Act (L. 1882, ch. 410), that is to say, *under the law as it stands to-day* also held that *the present corporation* was not liable for the negligent action of the employees of the fire department while engaged in testing a fire tower prior to its purchase by the City for use in the said department.

This case was Thompson *vs.* The Mayor, 52 Super., 427, a case decided by the General Term of the Superior Court in 1885.

This case last cited is exactly in point.

In the Court of Appeals also, while there the exact question here under discussion has never been squarely passed upon, yet in a decision which has become a leading case as to *ultra vires* of municipal corporations (Smith *vs.* City of Rochester, 76 N. Y., 506), after stating that the Common Council of Rochester exceeded its powers in ordering a midnight parade of the Fire Department for the celebration of the Centennial, the Court added :

> " Assuming, however, that the Common Council, " in making an order for a midnight parade of the " fire department to celebrate the centennial anni- " versary of the nation, had authority under the " provisions, last cited, the difficulty in maintaining " the plaintiff's action is **the well-settled rule " that a municipal corporation is not " liable for the negligence of firemen " while engaged in the line of their duty** " (Dillon on Municipal Corporations, sec. 774 ; " Hafford *vs.* New Bedford, 16 Gray, 297 ; Fisher " *vs.* Boston, 104 Mass, 87 ; Jewett *vs.* City of New " Haven, 38 Conn., 368 ; O'Meara *vs.* The Mayor, " 1 Daly, 425)."

> " The exemption from liability in most of the " cases last cited is placed upon the ground that " *the service is performed by the corporation for the " public good in obedience to law in which it has no " particular interest, and from which it derives no " particular benefit in its corporate capacity ; that* " the members of the Fire Department are not the " agents and servants of the city for whose conduct

"it is liable, but act as officers charged with a "public service for whose negligence in the dis- "charge of official duty no action lies against the "City, and a maxim of *respondeat superior* has no "application."

Smith *vs.* City of Rochester, 76 N. Y., 513.

And in a later case, Terhune *vs.* The Mayor, etc., of the City of New York, 88 N. Y., 247, and which was decided long after the union of the City and County of New York, the Court of Appeals held that the Fire Commissioners of the City of New York are public officers, not agents of the City, and that for their acts in wrongfully removing an officer in the Fire Department the City is not liable.

These are all the cases upon the subject in the State of New York, and none of them has ever been questioned or distinguished.

It is, therefore, respectfully submitted that the law of the State of New York to-day is that the City of New York is not responsible for the wrongs of its Fire Department.

POINT VI.

While the fire-boat may, perhaps, be classified as a maritime instrumentality, the result of this collision presents one of those exceptions to holding the City liable under the Maritime Law which is distinctly a requirement of public policy.

Judge Morris, in deciding the case of The F. C. Latrobe, in the 28th Federal Reporter, page 377, while

in that case he held the municipality liable, nevertheless distinctly recognized the fact that where a municipality employs martime instrumentalities, there are exceptions to holding the municipality liable under the general doctrine of the Maritime Law, which exceptions are based on considerations of public policy.

A boat such as the "New Yorker," while capable of being navigated and in that sense being a maritime instrumentality, is nevertheless, built, maintained and navigated for a specific purpose and not for the usual objects for which vessels are built.

If the "Linda Park" had caught fire it would have been the duty of the fire-boats operated by the Fire Department of the City of New York to do all that in them lay to extinguish the fire, nor would they have had any claim whatever for salvage.

It is to be observed that all of the fire-boats owned by the City of New York are constructed, controlled and operated under local laws, which laws have been construed by the highest Court in the State of New York, and this Court has held that, whenever the decisions of a State Court relate to some law of a local character, that the decisions upon that subject are conclusive.

In the case of Detroit *vs.* Osborne, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the Court, said, and quoting from the opinion in the case of Bucher *vs.* The Railroad Company, 125 U. S.:

> "It may be said generally that whenever the
> "decisions of the State Courts relate to some law
> "of a local character which may have become es-
> "tablished by those courts, or has always been a
> "part of the law of the State, that the decisions
> "upon the subject are usually conclusive, and al-

"ways entitled to the highest respect of the Fed-
"eral Courts."

Detroit *vs.* Osborne, 135 U. S., 499.

And to the same effect Burgess *vs.* Seligman, 107 U. S., 20; Clareborn *vs.* Brooks, 111 U. S., 400.

In the case of Haight and another against The Mayor, Aldermen and Commonalty of the City of New York, decided by the learned Judge of the District Court in May, 1885, the general principle now contended for was approved, and the libel in that case dismissed.

In the opinion in that case Mr. Justice Brown said:

"These facts bring the case, so far as I can
"see, entirely within the decision in the case
"of Maximilian *vs.* The Mayor, 62 N. Y., 161, where
"the responsiblity of the Corporation for the neg-
"ligent acts of persons in the employ of the De-
"partment of Charities and Corrections is dis-
"cussed by Folger, *C. J.*, with his usual fullness
"and learning; and the conclusion was there ar-
"rived at, sustained by principle and authority,
"that the corporation could not be held for the
"negligent acts of the employees of that depart-
"ment, because it is an independent board, over
"which the corporation has no control, and which
"does not act for the benefit of the corporation in
"the discharge of any of its corporate functions or
"duties."

Haight *vs.* The Mayor, 24 Fed. Rep., 93.

In the case of Edgerton *vs.* The Mayor, also decided by Mr. Justice Brown, and in which the differences between the liabilities of the City for the acts of the different departments were fully discussed, Mr. Justice Brown says:

"I deem it unnecessary to consider here the "somewhat nice distinctions which have been "made in the several cases decided in the Court "of Appeals in this State as regards the liability "of a city corporation for the negligent acts of the "servants employed under its different heads of "departments, as constituted by law. As respects "negligence by the employees of the Department "of Public Charities and Correction, of the *Fire* "*Department*, and of the Board of Education, it "has been adjudged that the Corporation is not "liable (Maximilian *vs.* Mayor, etc., 62 N. Y., "166; Smith *vs.* City of Rochester, 76 N. Y., 506; "Ham *vs.* Mayor, etc., 70 N. Y., 459). The first "of these cases was followed by this Court in the "case of Haight *vs.* Mayor, etc., 24 Fed. Rep., "93."

Edgerton *vs.* The Mayor, 27 Fed. Rep., 232.

VII.

The writ of certiorari should be quashed or dismissed.

Dated April 1, 1897.

FRANCIS M. SCOTT,
Counsel to the Corporation,
Proctor for the Mayor, Aldermen and Commonalty of the City of New York, Respondents.

FRANCIS M. SCOTT,
Solicitor for the Mayor, Aldermen and Commonalty of the City of New York.

No. 4-187

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Brief of Connoly for Appts.

[REC'D FEB 1 1899]

Supreme Court of the United States.

Filed April 3, 1899.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK AND JAMES A. GALLAGHER,

Appellants,

against

ROBERT W. WORKMAN,

Libellant—Appellee.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari. (Reargument.)

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Supreme Court of the United States.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,

Appellants,

against

ROBERT W. WORKMAN,

Appellee.

Certiorari to the United States Court of Appeals for the Second Circuit.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari (Reargument).

This is a review by a writ of certiorari by libellant, Robert W. Workman, of the determination of the United States Circuit Court of Appeals for the Second Circuit, which reversed (Record, p. 133) a decree of the District Court for the Southern District of New York, which latter decree had been in favor of the libellant. The facts as disclosed by the record are as follows:

The appeal by appellants to the United States Circuit Court of Appeals was from a decree of the District Court awarding the libellant and appellee the sum of

$815.84 as damages, interest and costs, against the Mayor, Aldermen and Commonalty of the City of New York and against James A. Gallagher, pilot of the fireboat "New York."

On Sunday the 11th day of June, 1893, the barkentine "Linda Park" was lying on the easterly side of Pier 48, East river, and moored a sufficient distance in toward the bulkhead, with her bow pointing toward the river to allow of a schooner's being moored to the same pier with *her* bow *in* toward the bulkhead, allowing a space of some 6 feet between the ends of the respective bowsprits (Record, pp. 9, 38), and alongside of the barkentine "Linda Park" lay a barge with a beam of from 30 to 35 feet (Record, p. 38). On the opposite pier and on the westerly side of Pier 49 was a covered railroad barge with a beam of some 40 feet (Record, p. 39).

By reference to a diagram in the case, the respective dimensions of the piers and bulkhead and the extent of the open water between Piers 48 and 40 will appear as follows: The width of the bulkhead between the piers is shown to be 129 feet and 54 inches; the length of Pier 48 is shown to be 329 feet and 58 inches; and the length of Pier 49 324 feet and 99 inches; and the clear water between the piers at the extreme ends upon the river front 126 feet and 42 inches.

Allowing for the closing of the clear water between the extreme ends of Piers 48 and 49, by the width of the barge at 40 feet, lying practically at the end of Pier 49, alongside the pier, and the width of the schooner lying practically at the extreme end of Pier 48 at 30 feet, the 126 feet and 42 inches of clear water is reduced by 70 feet, leaving 56 feet and 42 inches of clear water between Piers 48 and 49.

Some time between 3 and 4 o'clock Sunday afternoon, June 11, a fire broke out at the corner of Clinton street,

and both the fire-boats "New Yorker" and "Havemeyer" were summoned by telegraph to the scene. At the time the tide was running strong flood, and the "Havemeyer" (known as Engine-Company No. 43) coming down the East river and against the tide, from her station at the foot of Grand street, running in between Piers 48 and 49, made fast to the proper place at the bulkhead, and commenced to play upon the fire (see Record, pp. 54 and 55).

The "New Yorker," a larger and heavier boat, summoned from her station, Pier 1, North river, coming up with the tide and attempting to enter the slip, was caught by the eddy between the piers and swept against the "Linda Park." At the time the "New Yorker" reached the slip, according to the testimony of the libellant's witnesses, the fire had been under way some 20 or 30 minutes and was then blazing (see Record, p. 53, fol. 210).

For the injury done to the barkentine, on the 27th day of July, 1893, a libel was filed against the Mayor Aldermen, and Commonalty of the City of New York as sole respondents. On the 8th day of August, 1893, an answer was interposed by the Mayor, Aldermen and Commonalty, defending both upon the merits and upon the law, upon the ground that they were not responsible for any acts of negligence committed by the servants and employees of the Fire Department (see Record, pp. 3–11).

This case having been on the calendar of the District Court for a number of days and answered "ready," the respondents, the Mayor, Aldermen and Commonalty of the City of New York, on the 9th day of November, 1893, were ordered to show cause why the libel should not be amended by making the Board of Fire Commissioners of the City of New York and the captain of

the fire-boat "New Yorker" parties defendant therein (Record, p. 3).

The motion to amend the libel coming on to be heard before the District Judge on November 10, 1893, the District Judge allowed the amendment prayed for and allowed the respondent to bring in both the Fire Department and the defendant Gallagher, but upon the ground that

> "The authorities cited in the defendants' brief "make it apparently very doubtful whether the "libelant can recover against the City for the "faults of the Fire Department, however clear the "fault of the 'New Yorker' may be" (see Record, page 15).

Upon the order entered upon that decision of December 1, an amended libel was filed against the Mayor, Aldermen and Commonalty of the City of New York, against the Fire Department of the City of New York and James A. Gallagher, the pilot (see Record, p. 17).

On the 12th the defendant Gallagher filed his answer defending upon the merits (see Record, pp. 21-27). The respondent, the Fire Department, excepted to the libel for want of sufficiency, in that the amended libel failed to allege in what capacity the Fire Department of the City of New York was sued, and failed also to allege whether the Fire Department of the City of New York was a corporation, foreign or domestic, and because also there was no negligence charged in the amended libel against the Fire Department (see Record, p. 28).

These exceptions coming on to be heard on the 27th day of December, 1893, the District Court entered an order sustaining certain of the exceptions as therein recited (see Record, p. 29), and thereafter an amendment

to the amended libel was filed (see Record, p. 31), and thereafter the Fire Department answered (see Record, pp. 32–35), and the questions involved were at issue between all the parties of the record.

The case came on to be heard before the Judge of the District Court on the 9th day of April (see Record, p. 36), and thereafter the District Court decreed that the libel be dismissed as against the Fire Department of the City of New York, but rendered a decree against both the Mayor Aldermen and Commonalty of the City of New York and against James A. Gallagher, the pilot.

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit this decree of the District Court was reversed, except as to the provisions thereof relating to the Fire Department of the City of New York, and as to the appellant James A. Gallagher, and as to said James A. Gallagher the decree of said District Court was affirmed with costs.

An application was made to the Circuit Court of Appeals upon petition that the questions in the case be certified to this Court (Record, pp. 135–137). This application was denied, and the case was brought here upon a writ of certiorari (Record, p. 139).

After the argument upon the writ of certiorari this Court made an order that the matter be put back upon the calendar for reargument, and the matter now comes before the Court for such reargument.

POINTS.

I.

There is in the record no evidence upon which to predicate negligence in the pilot of the fire-boat "New Yorker," under the conditions existing at the time of the collision.

Fire-boats, when called upon to serve the purpose for which alone they are constructed, act always under the pressure of a present pressing emergency.

The record shows that when the "New Yorker" reached the scene of her action, a fire was blazing in one of the busiest and most crowded of the business sections of the city.

The fire had then been under headway for some time, and one of the fire-boats—the "Havemeyer"—was playing upon the burning building.

Under these conditions, assuming proof of some act of omission or commission on the part of the pilot, contributing to the collision, it was not in contemplation of law, such negligence as entails a liability to be paid in damages.

It is clear from the record that whatever was done in regard to the navigation of the "New Yorker" was done in the excitement of the moment, and in view of the extent of not only the possible but probable spread of the fire, under pressure of necessity.

These are circumstances in which in admiralty any fault of either omission or commission is held to be an error and not a fault.

The "Grace Girdler," 7 Wallace, p. 201.
The "City of Paris," 9 Wallace, p. 638.

The principle, however, upon which the question of negligence in this case must be determined has very recently been passed upon, both in the State of New York and in the State of Michigan.

In the case of Farley against The Mayor, Farley was the driver of a fire-engine; in going to a fire the fire-engine ran into a truck standing in the street, with the result that Farley was seriously injured. It was proven on the trial that Farley was driving at a rate of speed *forbidden by law*. Held by the lower courts to establish contributory negligence on the part of the plaintiff, to defeat a recovery.

The Court of Appeals, however, held:

> "It is manifest that section 1932 of the Consolidation Act can have no application to the speed at which engines or hose-carts connected with the Fire Department shall be driven *when going to a fire*. This section is not in the chapter regulating the Fire Department. By another section the vehicles of the Fire Department are given the 'right of way' at any fire over all other vehicles except those carrying the United States mail (section 444). The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the Fire Department *in going to fires*. Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the Fire Department on their way to fires."

Farley *vs.* The Mayor, etc., 152 N. Y., 227.

And the same principle was applied in

Coots *vs.* The City of Detroit, 75 Mich., 628.

Plainly a rate of speed entirely proper and necessary in going to a fire might and plainly would be improper in coming from a fire, so that no responsibility for damage would follow from injuries arising from an excessive speed in one case where the liability would plainly attach in the other.

The learned Judge in the District Court recognizes the principle, saying:

> "I have no doubt that some acts which might
> " properly be deemed negligent under ordinary
> " circumstances ought not be held negligent under
> " the stress of fires. But the same general rule is,
> " I think, nevertheless to be applied as the test of
> " what is due care, viz., the care that a man of
> " ordinary prudence would be reasonably supposed
> " to exercise under like circumstances, if the burn-
> " ing property, and the property damaged had been
> " his own.

Record, pp. 105, 106.

It is not disputed that it was the business of the pilot of the fire-boat "New Yorker" to reach the scene of the fire and bring his engines into play at the earliest possible moment. The only suggestion on the part of the libellant as to the course that he ought to have taken is found in the testimony of Allison Briggs, who gave it as his opinion that the proper course would have been to "warp in."

Record, p. 99.

II.

The Mayor, Aldermen and Commonalty of the City of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the Commissioners of the Fire Department in the performance of their public duties.

This exemption from liability springs from the nature of the duty performed by the officers and members of the Fire Department.

The extinguishment of fires is undertaken as a public or governmental duty, imposed for the public or general benefit, and from which the Corporation derives no corporate benefit or emolument.

The distinction between the powers and duties of municipal corporations from which corporate emolument is derived and those functions which are purely governmental, performed for the public good, from which no benefit or revenue comes to the Corporation, is made the test of liability for the consequence of neglect on the part of the agents necessarily employed by the Corporation.

In Dillon on Municipal Corporations (vol. 1, p. 107, 4th ed.), it is said, concerning municipal corporations, that they "possess a double character; the one gov-"ernmental, legislative, or public; the other in a sense "proprietary or private.

"The distinction between these, though sometimes "difficult to trace, is highly important and is frequently "referred to, particularly in the cases relating to the "implied or common-law liability of municipal cor-"porations for the negligence of their servants, agents,

"or officers in the execution of corporate duties and "powers."

Dillon on Municipal Corporations, 4th ed., vol. 2, page 1180, section 966, further says that municipal corporations are "considered to be impliedly liable "(unless the legislation negatives such liability) for "wrongful acts done in what is termed their private "or corporate character from which they derive some "special or immediate advantage or emolument, but "not as to such acts done in their public capacity as "governing agencies in the discharge of duties "imposed for the public or general (not corporate) "benefit."

The following cases are cited in support of the doctrine thus defined:

Oliver *vs.* Worcester, 102 Mass., 489.
Richmond *vs.* Long's Adm., 17 Gratt., 375.
Petersburg *vs.* Applegarth, 28 Gratt., 321.
Western Savings Fund Society, *vs.* Philadelphia, 31 Pa. St., 175, 189.
Bailey *vs.* The Mayor, 3 Hill, 531.
Maximilian *vs.* The Mayor, 62 N. Y., 160.

The following is quoted from Oliver *vs.* Worcester, 102 Mass., 489:

> "The distinction is well established between the "responsibilities of towns and cities for acts done "in their public capacity in the discharge of duties "imposed on them by the Legislature for the pub-"lic benefit, and for acts done in what may be "called their private character, in the management "of property and rights voluntarily held by them "for their own profit and advantage as a corpora-"tion, although inuring ultimately to the benefit "of the public."

In Bailey *vs.* The Mayor, 3 Hill, 531, the distinction between the public and private capacity of municipal corporations is maintained by Chief Justice Nelson. He says, in relation to municipal powers:

> "If granted for public purposes exclusively they "belong to the corporate body in its public politi- "cal or municipal character. But if the grant was "for the purposes of private advantage and emolu- "ment, though the public may derive a common "benefit therefrom, the corporation, *quoad hoc*, is "to be regarded as a private company."

And from such considerations the question of liability in the case was determined.

In the same case, 2 Denio, 433, the same distinction between governmental duties exercised for public benefit, and the duties through which the corporation derives benefit for itself is maintained, and the exemption contended for in the case at bar recognized, as follows:

> "On the other hand, where such corporation is "bound to appoint an officer for the performance "of a public duty it is not liable" (p. 446).

In Maximilian *vs.* The Mayor, 62 N. Y. Rep., the Court of Appeals say:

> "There are two kinds of duties which are im- "posed upon a municipal corporation: One is of "that kind which arises from the grant of a "special power, in the exercise of which the "municipality is as a legal individual; the other "is of that kind which arises, or is implied, from "the use of political rights under the general law, "in the exercise of which it is as a sovereign. The "former power is private, and is used for private "purposes; the latter is public and is used for

" public purposes (Lloyd *vs.* The Mayor, 5 N. Y.,
" 374). The former is not held by the munici-
" pality as one of the political divisions of the
" State; the latter is. In the exercise of the for-
" mer power, and under the duty to the public
" which the acceptance and use of the power in-
" volves, a municipality is like a private corpora-
" tion, and is liable for a failure to use its power
" well, or for an injury caused by using it badly.
" But where the power is intrusted to it as one of
" the political divisions of the State, and is con-
" ferred, not for the *immediate* benefit of the mu-
" nicipality, but as a means to the exercise of the
" sovereign power for the benefit of all citizens, the
" corporation is not liable for nonuser, nor for
" misuser by the public agents (Eastman *vs.*
" Meredith, 35 N. H., 284).

" Where the duties which are imposed upon
" municipalities are of the latter class, they are
" generally to be performed by officers who,
" though deriving their appointment from the
" corporation itself, through the nomination of
" some of its executive agents, by a power de-
" volved thereon as a convenient mode of exer-
" cising a function of government, are yet the
" officers, and hence the servants, of the public
" at large. They have powers and perform duties
" for the benefit of all the citizens, and are not
" under the control of the municipality, which has
" no benefit, in its corporate capacity, from the per-
" formance thereof. They are not then the agents
" or servants of the municipal corporation, but
" are public officers, agents or servants of the
" public at large, and the corporation is not re-
" sponsible for their acts or omissions, nor for the
" acts or omissions of the subordinates by them
" appointed (Fisher *vs.* Boston, 104 Mass., 87).

"And where a municipal corporation elects or "appoints an officer, in obedience to an act of the "Legislature, to perform a public service, in which "the corporation has no private interest, and from "which it derives no special benefit or advantage "in its corporate capacity such officer cannot be "regarded as a servant or agent of the municipality, *for whose negligence or want of skill it can "be held liable.*"

"It has appointed or elected him, in pursuance "of a duty laid upon it by law, for the general "welfare of the inhabitants or of the community."

In the same case the Court further says:

"Where it (the City) authorizes a use of its corporate property which use itself makes that "property harmful to others, it is liable. Such is "understood to be one of the grounds on which "went Bailey *vs.* The Mayor (2 Denio, 433). And "the duty of keeping in repair streets, bridges, and "other common ways of passage, and sewers, and "a liability for a neglect to perform that duty rests "upon an express or implied acceptance of the "power and an agreement so to do. It is a duty "with which the City is charged for its own corporate benefit, to be performed by its own agents "as its own corporate act (Conrad *vs.* Trustees of "Ithaca, 16 N. Y., 158). It is not always easy to "say within which class a particular case should "be placed. But when it is determined that the "power and duty are given and taken for the benefit of the corporation as a corporate body "and the act to be done is to be done by it "through agents of its appointment and under "its control and power of removal, there is no "doubt of its liability for negligent omission or "negligent attempt at performance. When the

" powers created and duly enjoined are given, and
" laid upon officers to be named by the corporation,
" but for the public benefit and as a convenient
" method of exercising a function of general gov-
" ernment, and the corporation has no immediate
" control nor immediate power of removal of those
" officers, nor of their subordinates and servants,
" then it is not liable for their negligent omission
" or action."

The doctrine of Maximilian *vs.* The Mayor has been repeatedly reaffirmed and enforced by the Court of Appeals of the State of New York in subsequent cases.

In Bieling *vs.* The City of Brooklyn, 120 N. Y. Rep., p. 98, where there was a recovery for damages sustained in consequence of the fall of a wooden awning in a street of the city, the Court says:

" The municipality can perform its functions
" only through officers or agencies. For the dis-
" charge of those powers of a governmental or
" political character, which are vested by the
" statute in officers, and those duties not placed
" upon it but upon officers or departments created
" and vested with powers for public purposes, as
" distinguished from those for the purposes of the
" corporation, it is not responsible for their mis-
" conduct or neglect, to individuals suffering dam-
" ages as the result of it (Lloyd *vs.* Mayor, etc., 5
" N. Y., 374; Maximilian *vs.* Mayor, etc., 62 *id.*,
" 160; Ham *vs.* Mayor, etc., 70 *id.*, 459; Smith *vs.*
" City of Rochester, 76 *id.*, 506)."

" There are various duties which are legitimately
" those of the corporation, amongst which is that
" of taking care of the streets within it. To keep
" them in safe condition for public use was a
" primary duty resting upon the City of Brooklyn."

The same principle has been adjudicated in other States.

In Mead *vs.* New Haven, 40 Conn., 72, where a city, under power given by its charter, appointed an inspector of steam boilers within the city, and by by-law imposed a penalty on any person who should use such a boiler without having it tested by the inspector, it was held that the city was not liable for negligence of the inspector in the discharge of his duty.

The Court says:

> "The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The City, as such, has no pecuniary or individual or private interest in the matter, and although the power of the City over the subject is conferred by the charter, and not by the general law, yet the City must, we think, be regarded as the agent of the government, and, acting for the State, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence."

See also—

Brown *vs.* Vinalhaven, 65 Maine, 402.
Mitchell *vs.* Rockland, 52 Maine, 118.

III.

The doctrine of Maximilian vs. The Mayor, 62 N. Y., 160, has not been modified or limited in the State of New York.

It seemed to have been contended by libellant on the former argument herein that the case of Hill *vs.* The Mayor, 139 N. Y., 495, has in some way limited the general doctrine of Maximilian *vs.* The Mayor, 62 N. Y., 160, contended for by the City of New York in this case.

An examination, however, of the case of Hill *vs.* The Mayor will show that it has no such effect.

That was an action brought to compel the removal of a structure erected by the City of New York on a pier in that city, and used by the Street Cleaning Department for dumping ashes, etc.

In other words, the action was one to restrain the continuance of the nuisance.

The first paragraph of the head-note correctly sets forth the point decided by the Court of Appeals in the Hill case, so far as the same is applicable to the present one.

> "The rule that a municipal corporation, engaged in the performance of a public duty upon which the public health and comfort depends, and acting under authority of the Legislature, is not liable for consequential damages to others, even though its act amounted to a nuisance as between individuals, has this limitation: the authority must be express or a clear and unquestionable implication from powers conferred; it must be certain and unambiguous, and such as to show that the Legislature must have contemplated the very act in question."

And the Court examined the statute and held that there was no authority thereunder for the City, through its department, doing the act complained of.

In a somewhat later case the Court of Appeals, in speaking of the Hill case, and other similar ones, said:

> "These cases have grafted upon the principle "contended for in behalf of the defendant that "legal liability and damages cannot result from "acts done by a corporation in the performance of "a public duty by express legislative authority re- "sulting in consequential injury to others, and "which, as between individuals, will be regarded "as a nuisance, an important limitation. It is that "the authority that will shelter *an actual nuisance* "must be express, or a clear and unquestionable "implication from powers conferred certain and "unambiguous such as to show that the Legisla- "ture must have intended and contemplated the "doing of the very act in question (Hill *vs.* Mayor, "etc., 139 N. Y., 495; Bohan *vs.* Port Jervis Gas- "light Co., 122 *id.*, 18; Cogswell *vs.* N. Y., N. H. "& Hartf. R. R. Co., 103 *id.*, 10)."
>
> Morton *vs.* Mayor, 140 N. Y., 212.

It will be seen from this that both the Hill and Morton cases were cases of the maintenance of *an actual nuisance.*

It is more than doubtful that the City is liable even for the negligence of the Street Cleaning Department, or for that of a department performing corresponding functions.

This question has been decided in the negative in Love *vs.* Atlanta, 95 Ga. 129, and Connelly *vs.* Mayor (Tenn.), 46 S. W. Rep., 565, in which cases Boards of Health, performing duties imposed under the New York statutes upon the Street Cleaning Department, were held not liable for negligence.

And the precise point of the liability of a city for the negligence of a street-cleaning department while engaged in removing ashes and garbage was decided in Condict *vs.* Jersey City, 46 N. J. L., 157, in which it was held that the City was not liable therefor.

There is no decision in this country, so far as counsel is aware, holding a city liable for the negligence of a street-cleaning department engaged in removing ashes and garbage, except the unreported case of Quill *vs.* The Mayor, decided by the Appellate Division of the Second Department in the State of New York upon the special ground that the duty of keeping their premises clear of ashes and garbage is imposed primarily upon the householders, and not upon the City, and the Court said:

> "The burden of removing the ashes, if the "owner does not wish them to remain longer "upon his property, is primarily just as much his "obligation as it was to bring to his premises in "the first instance the coal from the burning of "which the ashes proceeded. * * * Indeed "the distinguishing feature which characterizes "such services as municipal *is that they are pri-* "*marily the work of individual citizens.*"

Whether this case (which is now on appeal) is good or bad law it does not affect the precise question in the present case, because there is no likeness between the duty of removing ashes and garbage from the streets of a city and from private premises and the duty imposed by the State upon a municipality of extinguishing fires.

There is surely no private duty at all in the latter case.

It is simply a governmental function imposed on the City by the State.

The conclusion reached in the case of Bailey *vs.* The Mayor, 3 Hill, 531—a case sometimes cited in this class of cases—was simply that a municipal coporation *in its private character* as the owner of lands, etc., is to be regarded in the same light as an individual and dealt with accordingly, and that the powers granted by an act of 1834 to provide for supplying the City of New York with pure and wholesome water was intended for the private advantage and emolument of the City, the State, in its sovereign capacity, having no interest in them.

This case evidently does not apply to the present one, and, even in the State of New York, has been overruled.

See—

Darlington *vs.* The Mayor, 31 N. Y., 164.
Fire Insurance Co. *vs.* Village of Keeseville, 154 N. Y., 54.

The attention of the Court is earnestly called to the case last mentioned as being a reiteration on somewhat different facts of the fundamental distinction drawn in the Maximilian case, which latter case has also been since followed in two late cases—Hughes *vs.* County of Monroe, 147 N. Y., 49, and Markey *vs.* County of Queens, 154 N. Y., 675—without the slightest indication or desire on the part of the Court of Appeals to in any way limit its doctrine.

It is submitted, therefore, that none of the cases referred to in any way qualify the doctrine of Maximilian *vs.* The Mayor, *supra*, upon which the City of New York in this case relies.

IV.

This exemption from liability growing out of the nature of the duties performed is recognized and enforced, even when the duties are defined, and the executive officers created to perform the same by provisions in the charter, or organic act creating the municipal corporation, as well as when the duties are imposed upon corporate officers by independent statutes.

In Maxmilian *vs.* Mayor, the servant by whose negligence the plaintiff was injured, was appointed by the Commissioners of Charities and Correction, corporate officers, to whom was intrusted the execution of the laws in relation to the relief of the poor sustained in the almshouses and hospitals, and in relation to criminals in custody in the public prisons.

Such Commissioners were, in the first instance, invested with power by an independent act, chapter 510 of the Laws of 1860, page 1026.

At the time of the occurrence by which the plaintiff was injured, the Commissioners of Charities and Correction had become a department of the City Government, under and pursuant to section 80, chapter 137 of the Laws of 1870, the City Charter, provided for, as such department, by specific provisions in the Charter of the City, authorized to exercise all the powers and duties defined by the Act of 1860.

The Court notices the creation of the Commissioners by the Act of 1860 and subsequent transformation into a department of the City Government, as follows:

> "By this act (the Act of 1860) that department
> "is created in the City and County of New York,

"and it is declared that there shall be chief officers "thereof, and their name of office is designated "(sec. 1). They thereby have their appointment "from the Comptroller of the City and County, "though since then they are made a department of "the City and appointable by the Mayor (Laws of "1870, chap. 137, p. 366, sections 29-30; p. 386, "sec. 80).

The Court further say:

"The Commissioners of Charities and Correc- "tion are public officers, though getting their right "of office from a circumscribed locality; and the "acts which they may do are to be done in their "capacity as public officers, in the discharge of "duties laid upon them by the law for the public "benefit, and far removed from acts done by city "or town, in its municipal character, in the man- "agement of its property for its own profit or "advantage. It is seen at once that the powers "and duties of the Commissioners of Charities and "Correction are not to be exercised and performed "for the especial benefit of the defendant (the City "of New York). It gets no emolument therefrom, "nor any good as a corporation. It is the public, "or individuals as members of the community, "who are interested in the due exercise of these "powers and the proper performance of their "duties."

The analogy between the duties of the Commissioners of Charities and Correction and of the Fire Commissioners, as to the public, governmental character thereof, is complete; and the Fire Department, although an executive department of the City Government, still performs duties which pertain not to the emolument of the Corporation or its special benefit, and which pertain only to the public good and the performance of a public duty.

The Fire Department originated also by a system of laws similar to the laws by which the Department of Charities and Correction was created.

Prior to 1865 the extinguishment of fires was undertaken by volunteer associations, to which the municipality furnished apparatus, and by ordinances regulated, in some respects, the government thereof.

For the acts or negligence of such associations, their officers or members, when engaged in extinguishing fires, the Courts held that the Corporation was not liable.

O'Meara *vs.* The Mayor, 1 Daly, 425.

By chapter 249 of the Laws of 1865, page 395, the Metropolitan Fire District was established; the appointment of Commissioners provided for; an elaborate provision made for the government and discipline of the officers and members thereof; the duties defined, and provision made for the payment to the officers and members for services performed.

Subsequently by section 30, chapter 137, Laws of 1870, being the City Charter, a Fire Department was created in the City Government, and by section 1 of the same act, as amended by section 16 of chapter 574, Laws of 1871, the Municipal Fire Department was constituted, consisting of a board of five persons authorized to perform all the duties prescribed by the Act of 1865, in relation to the extinguishment of fires.

The Fire Department thus became a charter department, empowered and authorized to execute the State law in respect to a duty in which the City has no pecuniary or private interest, and in which the department is still to be regarded as the agent of the State Government, acting for the State in executing governmental power for the public and not for the corporate benefit.

The educational establishment of the City is another instance of a department created within the City Government, authorized to discharge duties not local or corporate, but related to and belonging to the administration of the State Government; which, although formally a department of the Municipal Government, is still, by the decision of the Court of Appeals, recognized as an administrative branch of the State Government, for which the City is not liable in damages in respect to negligence of an employee of the department.

Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

It therefore may be considered to be the established doctrine, that if the nature of the duty performed is governmental and not corporate, the City is exempt from liability for the negligence of an officer, agent or servant appointed by it to execute such duty, even when the duty is cast upon a department or officer of the municipality, by specific provisions in the corporate charter.

V.

The duties of a Fire Department are governmental and not corporate, and consequently of the class upon which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

It is said in Dillon on Municipal Corporations, above quoted, that the distinction between corporate and governmental duties is well established, though difficult to trace. It is therefore proper to refer to the

concrete cases in which the Courts have defined the distinction.

(*a*) It is well settled that the caring for public streets, keeping them in order for safe and convenient use, regulating, grading and paving them, is deemed to be a duty assumed by the corporation, in consideration of the privileges granted by its charter, performed for its corporate advantage, and therefore that liability in damages is cast upon the corporation, in case of negligence on the part of its officers, agents or servants in respect to the performance of such duties.

Maximilian *vs.* The Mayor, *supra.*
Bieling *vs.* City of Brooklyn, 120 N. Y. Rep., 106.
Ehrgott *vs.* The Mayor, 96 N. Y.
Rehberg *vs.* The Mayor, 91 N. Y. Rep., 144.
Hume *vs.* The Mayor, 74 N. Y. Rep., 264.

The duties performed by the Commissioners of Charities and Correction in support of the poor, and the confinement of prisoners under criminal charges, and the performance of duties connected with the maintenance of the school system have been distinctly defined by the Court as falling within the class of governmental duties performed for the public and not corporate benefit, and no liability for negligence on the part of the officers, agents or servants employed therein is imputed.

Maximilian *vs.* The Mayor, 62 N. Y. Rep., 162.
Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

In respect to the extinguishment of fires, the decisions of the Courts in all the States agree in including that duty among the governmental functions performed by municipal corporations in behalf of the public, as to

which the corporation is exempt from liability in damages for neglect of the officers, agents or servants employed therein.

In the American and English Encyclopædia of Law, volume 7, page 997, it is said:

> "The members of the Fire Department of a mu-
> " nicipality are public officers, and not the mere
> " servants of the municipality; and, in the ab-
> " sence of an express statute, the municipal cor-
> " poration is not liable for injuries occasioned by
> " the negligence of the members of its Fire De-
> " partment in performing their duties."

And this doctrine is supported by numerous cases cited.

The text-books are emphatic and clear on the subject, and maintain the same doctrine.

Judge Dillon's well-known work has already been referred to.

In the latest book on the subject it is said:

> "Municipal corporations are not liable for the
> " negligence of their firemen—although they may
> " be appointed and removed by the City, and the
> " performance of duties are wholly subject to its
> " control."
>
> Tiedeman on Municipal Corporations, sec. 333*a*.

And another very recent work also says:

> "Members of a Fire Department, as officers
> " charged with a public service, are not the agents
> " or servants of the city which appoints them, and
> " the city is therefore not liable for their negligent
> " discharge of official duty, nor is it liable for neg-

" ligence in the performance of a public duty im-
" posed by law upon its members.

1 Beach on Public Corporations, sec. 744. And see also Jones on Negligence of Municipal Corporations, sec. 31.

After a careful search of the authorities, and after throwing aside a great number of decisions which relate to failure to supply water, and which, although bearing on the question, are not absolutely in point, the following authorities will be found to sustain, without exception and under the varying circumstances therein discussed, the doctrine of the non-liability of a municipal corporation for the acts of its fire department.

And the attention of the Court is most earnestly called to the fact already pointed out, that in the decisions no distinction whatever is drawn between fire departments organized by a distinct and separate law of the State, and fire departments which are organized under a city charter, or which by the wording of the statutes creating them, form an integral part of the administration of the City Government, although not specifically named in the City Charter.

The following are the principal cases, with a short memorandum of the facts under which they arose:

Hafford *vs.* New Bedford, 16 Gray, 297 (hose-carriage on way to fire running over person).

Fisher *vs.* Boston, 104 Mass., 87 (injuries from bursting hose).

Burrill *vs.* Augusta, 78 Me., 118 (frightening horse by escaping steam from engine left in street).

Wild *vs.* Patterson, 47 N. J. Law, 406 (injury arising from defect in brake of engine).

Hayes *vs.* Oshkosh, 33 Wis., 314, (fire caused by negligent management of engine, allowing escape of sparks, etc).

Kies *vs.* Erie City, 135 Pa. St., 144 (negligent arrangement of engine-house doors).

Wilcox *vs.* City of Chicago, 107 Ill., 334 (collision with hook-and-ladder wagon).

Edgerly *vs.* Concord, 59 N. H., 78 (negligent testing of hydrant).

Howard *vs.* San Francisco, 51 Cal., 52 (collision with engine).

McKenna *vs.* St. Louis, 6 Mo. App., 320 (negligent running of hose-carriage).

Jewett *vs.* New Haven, 38 Conn., 368 (negligent driving of hose-carriage).

Heller *vs.* Sedalia, 53 Mo., 159 (want of proper exertions to extinguish fire).

Grube *vs.* St Paul, 34 Minn., 402 (careless driving of hose-carriage).

Wheeler *vs.* Cincinnati, 19 Ohio St., 19 (insufficient water and insufficient efforts to extinguish fire).

Brinkmeyer *vs.* Evansville, 29 Ind., 187 (insufficient water and engines out of repair).

Robinson *vs.* Evansville, 87 Ind., 334 (hose insufficient in length to reach fire).

Welsh *vs.* Rutland, 56 Vt., 228 (slipping on ice arising from water escaping from a fire-hydrant).

Greenwood *vs.* Louisville, 13 Bush, 226 Ky. (engine negligently running over person on sidewalk).

Freeman *vs.* Philadelphia, 7 W. N. C., Pa., 45 (injuries from careless driving of engine).

Knight *vs.* Philadelphia, 15 W. N. C. Pa., 307 (injuries from careless driving of fire-engine).

Dodge *vs.* Granger, 17 R. I., 664; 24 Atl. Rep., 100 (negligent projection of ladder from engine-house).

Lawson *vs.* City of Seattle, 6 Wash., 184; 33 Pac. Rep., 347 (defective brace).

Gillespie *vs.* City of Lincoln, 35 Neb., 34; 52 N. W. Rep., 811 (killing by ladder-wagon).

Simon *vs.* Atlanta, 67 Ga., 618 (collision with rope stretched across street by municipality to allow parade of Fire Department).

In Hafford *vs.* New Bedford, 16 Gray, 297, already cited, it is said:

> "The members of the Fire Department of New "Bedford, when acting in the discharge of their "duties, are not servants or agents in the employ- "ment of the city, for whose conduct the city can "be held liable; but they act rather as officers of "the city, charged with the performance of a cer- "tain public duty or service, and no action will "lie against the city for their negligence or im- "proper conduct while acting in the discharge of "their official duty."

In this case the members of the Fire Department were acting under a law which had been accepted by a popular vote of the citizens, and made a part of the organic law of the city, and the officers and members were paid from the City treasury for their services.

In Fisher *vs.* Boston, 104 Mass., 87, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of a hose attached to a fire engine.

The Court say :

> "It makes no difference whether the Legislature "itself prescribes the duties of the officers "charged with the repair and management of fire-"engines, or delegates to the city or town, the "definition of those duties by ordinance or by-"law. However appointed or elected, such per-"sons are public officers, who perform duties im-"posed by the law for the benefit of all the citizens "the performance of which the city or town has "no control over, and derives no benefit from, in "its corporate capacity. The acts of such public "officers are their own official acts, and not the "acts of the municipal corporation or its agents."

In Jewett *vs.* New Haven, 38 Conn., 368, where the plaintiff was negligently run into and injured by the driver of a hose-cart, a member of the Fire Department, who was hastening to the engine-house to procure additional hose for use at a fire; held, that the members of the Fire Department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the city, for whose negligence it can be held liable.

The Fire Department in this case was a paid fire department, organized under a law accepted by a popular vote of the citizens of the city, and made a part of the organic law of the municipality.

The quotation from the opinion of Chief Justice Butler, inserted by the learned Trial Judge in his opinion in the case at bar, is a quotation from a dissenting opinion, and while doubtless quoted by the

Court Justice below as well expounding Judge Butler's views, yet defines the doctrine which was condemned by the decision in the case.

In Knight *vs.* Philadelphia, 15 W. N. C. (Pa.) 307, the Court says:

> "The members of the Fire Department are not "such servants of the Municipal Corporation as "to make it liable for their acts of negligence. "Their duties are of a public character and for a "high order of public benefit. The fact that the "act of Assembly did not make it obligatory on "the City to organize a Fire Department, does not "change the legal liability of the municipality for "the conduct of the members of the organization. "The same reason which exempts the City from "liability for the acts of its policemen applies "with equal force to the acts of its firemen."

In O'Meara *vs.* The Mayor, 1 Daly, 425, the Court says:

> "The powers exercised by the defendants in re- "ference to the Fire Department, are conferred "and employed exclusively for the public benefit, "not for purposes of private advantage and emol- "ument, and this is an answer to the plaintiff's "claim."

The definition of the Court in relation to the nature of the powers exercised by those who extinguish fires as officers of the Fire Department, is equally applicable to the department, organized under the present laws, as it was to the volunteer department, which was organized, sustained, and supplied by the City, at the time when the last-mentioned case was decided.

VI.

The contention of the defendants in this case does not controvert the doctrine laid down in Barnes vs. The City of Columbia, 91 U. S. Rep., 530.

The action in that case was brought to recover for damages sustained by the plaintiff in consequence of falling into an excavation in the street, negligently left there by the Commissioners authorized to improve the streets.

The duty performed by the Commissioners, in behalf of the municipality, was the duty of caring for streets, which, in all the cases in this State, and all other States, is held to be a duty performed for the corporate benefit, as to which a liability in damages arises, if the officers charged with executive powers in respect thereto are negligent in the performance of their duty.

The duty which was performed by the Commissioners was a corporate duty, distinguishable from the governmental duty of extinguishing fires, which is performed for the public, and not for the corporate advantage and benefit.

Respondents argue, therefore, that the foregoing authorities and the principles thereby illustrated sustains the following proposition:

1st. That the municipal corporation, through the Fire Department, exercises powers which are purely governmental, for the public benefit; from which it derives no revenue or emolument as a corporation; therefore, that it is not liable for the consequence of the neglect of an agent necessarily employed by it, in the absence of express statute creating such liability.

The position of the defendants in relation to the performance of the duty of extinguishing fires, and its relation to the public, is clearly illustrated by the case of Murphy *vs.* The Commissioners of Emigration, 28 N. Y. Rep., 142.

The Commissioners of Emigration were public governmental agents, exercising their powers for the public good and not for their individual advantage or emolument.

They were sued for the value of property lost by the neglect of their agents.

It was argued in their defense that they were representatives of the Government transacting public business through agents; that the government, and consequently the Commissioners, is not liable for the neglect of the agents if necessarily employed in transacting public business.

Citing—

Story on Agency, sec. 319.
Story on Bailment, sec. 462.
Seymour *vs.* Van Slyck, 8 Wendell, 403 422.
United States *vs.* Kirkpatrick, 9 Wheaton, 435.
Whitfield *vs.* Lord de Spencer, Cowp., 342.

And the Court in its opinion in this case of Murphy *vs.* Commissioners of Emigration, *supra*, said:

> "The position of the defendants is distinguish-
> "able from that of persons acting for their own
> "benefit or employing others for their own benefit.
> "They do not act for their own benefit or employ
> "agents, clerks or servants for their own benefit,
> "but for the benefit of the community at large."

Story on Agency, section 319, says:

"The doctrine is now firmly established that "public officers and agents are not responsible for "the misfeasance or positive wrongs, or for the "nonfeasance or negligences of the servants and "other persons properly employed by and under "them, in the discharge of their special duties."

Upon the same principle, an action does not lie against the Postmaster-General for property lost in course of transmission through the mail.

Whitfield *vs.* Lord De Spencer, Cowp., 342.

The controversy in the case at bar is altogether similar to the contention that the City is liable for the negligence or neglect of policemen employed by it in the preservation of the public peace.

That such liability does not exist is well settled.

McKay *vs.* City of Buffalo, 9 Hun, 401; affirmed 74 N. Y. Rep., 619.

Nor is the City liable for the acts of its Board of Health.

Bamber *vs.* City of Rochester, 26 Hun, 587.

The doctrine of exemption from liability of municipal corporations for the neglect of police officers is now fixed beyond controversy; the similarity in the nature of the duty performed by policemen and by firemen is obvious; and that both perform governmental functions is obvious; and the principle which exempts the municipal corporation by which both policemen and firemen are appointed or employed, is equally applicable as to both policemen and firemen.

VII.

The law, as laid down by the Courts of the State of New York, is positive and clear.

As has already been suggested hereinbefore, the decisions of the various States cited draw no distinction between liability for the acts of a fire department organized under a city charter and fire departments organized under separate and special acts, but performing their functions within a specific area.

This is important in view of the evident stress laid by the trial Judge below upon the supposed distinction in the decisions of the State of New York between the powers of the New York City Fire Department as organized prior to, and as existing after the department became by statute a part of the administration of the City Government.

The first case in the State has been already mentioned--O'Meara *vs.* The Mayor, 1 Daly, 425.

That case was decided under the law relating to the old Fire Department, and was before the union of the City and County of New York.

But the Court said that the members of the Fire Department of this City owe their allegiance to the City, not as members of a corporation, but as members of an organization identified with the administration of the City Government and forming a part of its protective police; that the powers exercised by the City Corporation in reference to the Fire Department are conferred and employed exclusively for the public benefit, and the Corporation cannot be held liable as a master for the wrongful acts of firemen.

The Court said, in reference to the duties of the firemen:

> "They are for the pecuniary benefit of the in-
> "habitants of the city as well as for their personal
> "safety. They result in no benefit or advantage
> "to the defendants other than to individuals, and
> "then only when a loss or disaster is averted by
> "their efforts. The powers exercised, therefore,
> "by the defendants in reference to the fire depart-
> "ment are conferred and employed exclusively
> "for the public benefit, not for purposes of private
> "advantage or emolument, and this is the answer
> "to the plaintiff's claim (The Mayor, etc., *vs.*
> "Bailey, 2 Denio, 433; Lloyd *vs.* The Mayor, etc.,
> "5 N. Y., 369; Griffin *vs.* The Mayor, etc., 9 N.
> "Y., 456)."

In 1875 it was held that the City was not liable for the acts of the Metropolitan Fire Department, and the Court, after showing by its citation of authorities that it did not regard the fact as to whether or not the department was created under the City Charter one of importance, said:

> "In the management of the property and appa-
> "ratus and in their acts put forth in the extin-
> "guishment of fires, the firemen act not for the
> "city corporation, but for the general public."
>
> Woolbridge *vs.* The Mayor, 49 How. Pr., 67.

And a much later case decided under the present Consolidation Act (L. 1882, ch. 410), that is to say, *under the law as it stands to-day* also held that *the present corporation* was not liable for the negligent action of the employees of the Fire Department while engaged in testing a fire tower prior to its purchase by the City for use in the said department.

This case was Thompson *vs.* The Mayor, 52 Super., 427, a case decided by the General Term of the Superior Court in 1885.

This case last cited is exactly in point.

In the Court of Appeals also, while there the exact question here under discussion has never been squarely passed upon, yet in a decision which has become a leading case as to *ultra vires* of municipal corporations (Smith *vs.* City of Rochester, 76 N. Y., 506), after stating that the Common Council of Rochester exceeded its powers in ordering a midnight parade of the Fire Department for the celebration of the Centennial, the Court added :

> "Assuming, however, that the Common Council, " in making an order for a midnight parade of the " fire department to celebrate the centennial anni- " versary of the nation, had authority under the " provisions, last cited, the difficulty in maintaining " the plaintiff's action is **the well-settled rule " that a municipal corporation is not " liable for the negligence of firemen " while engaged in the line of their duty** " (Dillon on Municipal Corporations, sec. 774; " Hafford *vs.* New Bedford, 16 Gray, 279 ; Fisher " *vs.* Boston, 104 Mass., 87 ; Jewett *vs.* City of New " Haven, 38 Conn., 368 ; O'Meara *vs.* The Mayor, " 1 Daly, 425)."

> "The exemption from liability in most of the " cases last cited is placed upon the ground that " *the service is performed by the corporation for the " public good in obedience to law in which it has no " particular interest, and from which it derives no " particular benefit in its corporate capacity ; that* " the members of the Fire Department are not the " agents and servants of the city for whose conduct

"it is liable, but act as officers charged with a "public service for whose negligence in the dis- "charge of official duty no action lies against the "City, and a maxim of *respondeat superior* has no "application."

Smith *vs.* City of Rochester, 76 N. Y., 513.

And in a later case, Terhune *vs.* The Mayor, etc., of the City of New York, 88 N. Y., 247, and which was decided long after the union of the City and County of New York, the Court of Appeals held that the Fire Commissioners of the City of New York are public officers, not agents of the City, and that for their acts in wrongfully removing an officer in the Fire Department the City is not liable.

These are all the cases upon the subject in the State of New York, and none of them has ever been questioned or distinguished.

It is, therefore, respectfully submitted that the law of the State of New York to-day is that the City of New York is not responsible for the wrongs of its Fire Department.

VIII.

While the fire-boat may, perhaps, be classified as a maritime instrumentality, the result of this collision presents one of those exceptions to holding the City liable under the Maritime Law which is distinctly a requirement of public policy.

Judge Morris, in deciding the case of The F. C. Latrobe, in the 28th Federal Reporter, page 377, while

in that case he held the municipality liable, nevertheless distinctly recognized the fact that where a municipality employs maritime instrumentalities, there are exceptions to holding the municipality liable under the general doctrine of the Maritime Law, which exceptions are based on considerations of public policy.

A boat such as the "New Yorker," while capable of being navigated and in that sense being a maritime instrumentality, is nevertheless built, maintained and navigated for a specific purpose, and not for the usual objects for which vessels are built.

If the "Linda Park" had caught fire it would have been the duty of the fire-boats operated by the Fire Department of the City of New York to do all that in them lay to extinguish the fire, nor would they have had any claim whatever for salvage.

The Blackwall, 10 Wall, p. 1.
Davey *vs.* "The Mary Frost," 2 Woods, p. 306.
Murphy *vs.* Ship "Suliote," 5 Yed. Rep., 99.
The "European," 13 U. S. App., p. 643.

It is to be observed that all the fire-boats owned by the City of New York are constructed, controlled and operated under local laws, which laws have been construed by the highest Court in the State of New York, and this Court has held that whenever the decisions of a State Court relate to some law of a local character, the decisions upon that subject are conclusive.

In the case of Detroit *vs.* Osborne, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the Court, said, and quoting from the opinion in the case of Bucher *vs.* The Railroad Company, 125 U. S., 555:

"It may be said generally that whenever the
"decisions of the State courts relate to some law

" of a local character which may have become es-
" tablished by those courts, or has always been a
" part of the law of the State, that the decisions
" upon the subject are usually conclusive, and al-
" ways entitled to the highest respect of the
" Federal courts."

Detroit *vs.* Osborne, 135 U. S., 499.

And to the same effect Burgess *vs.* Seligman, 107 U. S., 20; Clairborne Co. *vs.* Brooks, 111 U. S., 400.

In the case of Haight and another against The Mayor, Aldermen and Commonalty of the City of New York, decided by the learned Judge of the District Court in May, 1885, the general principle now contended for was approved and the libel in that case dismissed.

In the opinion in that case Mr. Justice Brown said:

" These facts bring the case, so far as I can see,
" entirely within the decision in the case of Maxi-
" milian *vs.* The Mayor, 62 N. Y., 161, where the
" responsibility of the Corporation for the negli-
" gent acts of persons in the employ of the De-
" partment of Charities and Corrections is dis-
" cussed by Folger, *C. J.*, with his usual fullness
" and learning; and the conclusion was there ar-
" rived at, sustained by principle and authority,
" that the corporation could not be held for the
" negligent acts of the employees of that depart-
" ment, because it is an independent board, over
" which the corporation has no control, and which
" does not act for the benefit of the corporation in
" the discharge of any of its corporate functions or
" duties."

Haight *vs.* The Mayor, 24 Fed. Rep., 93.

In the case of Edgerton *vs.* The Mayor, also decided by Mr. Justice Brown, and in which the differences between the liabilities of the City for the acts of the dif-

ferent departments were fully discussed, Mr. Justice Brown says:

> "I deem it unnecessary to consider here the "somewhat nice distinctions which have been "made in the several cases decided in the Court "of Appeals in this State as regards the liability "of a city corporation for the negligent acts of the "servants employed under its different heads of "departments, as constituted by law. As respects "negligence by the employees of the Department "of Public Charities and Correction, of the *Fire* "*Dep ment*, and of the Board of Education, it "has been adjudged that the Corporation is not "liable (Maximilian *vs.* Mayor, etc., 62 N. Y., "166; Smith *vs.* City of Rochester, 76 N. Y., 506; "Ham *vs.* Mayor, etc., 70 N. Y., 459). The first of "these cases was followed by this Court in the "case of Haight *vs.* Mayor, etc., 24 Fed. Rep., "93."
>
> Edgerton *vs.* The Mayor, 27 Fed. Rep., 232.

IX.

The Argument of Ab Inconvenienti.

A large part of the brief of libellant is taken up with attempting to show the very great dangers which will flow from holding a city not liable for the acts of its fire-boat.

The industry of the counsel for libellant has collected at page 23 of his original brief a list of twenty-four municipal fire-boats (belonging to eleven cities), which have been built within the last twenty-five years.

One answer to the alarming picture drawn by the learned counsel of possible injury inflicted by fire-boats

is that the present case is the first one ever brought against a municipality for the tort of such a boat, and there is but one other to be found—The Thompson Navigation Company *vs.* The City of Chicago, referred to in the supplemental brief of libellant.

It is apparent, therefore, that if in the whole country in twenty-five years there have been but two suits brought of this character, the danger of damage to shipping from this source is not shown to be every great.

In addition to this statement of the actual fact, as opposed to theory, it may be noted that the libellant's contention that the Court in this case should be governed by the doctrine *ab inconvenienti* leads to very curious consequences.

The Government of the United States is the owner of many vessels.

If the non-liability of a few cities for the torts of twenty-four small fire-tugs is so dangerous, what shall be said of the non-liability of the Government for the torts of its numerous vessels?

The law always has been, and is, that the Government of the United States enjoys entire immunity from suit for the torts of its vessels.

If there was any force to the contention of the libellant in regard to a city, how much more overwhelming would be the reasons for compelling the modification of the doctrine of exemption of the United States Government!

That there has been no such demand for such exemption, nor any complaint of hardship worked by it, shows that the fears of libellant in regard to the fireboats of the cities entirely unfounded.

X.

The Objection of Want of Uniformity.

This objection is raised at page 6 *et seq.* of libellant's supplemental brief.

The answer is, that in this country the rule of non-liability of municipal corporations for the acts of officers who fulfill governmental functions *is absolutely uniform*, and as is shown by the cases cited at page 26 *et seq.*

On a point which forms a part of the one just mentioned, namely, that the differing State systems are not steadfast, the libellant cites two cases: Barney Dumping Boat Co. *vs.* Mayor, 40 Fed. Rep., 450; and Bishop *vs.* The Mayor, 20 Misc., N. Y., 598; both cases having relation to the Street Cleaning Department of New York City.

The Barney Dumping Boat case held the City liable for the torts of the department in question, and the case of Bishop *vs.* The Mayor, which was a case at Trial Term in the Supreme Court in New York County, has been since reversed by the Appellate Division of the Supreme Court under the name of Quill *vs.* The Mayor, 36 App. Div., N. Y., 476, already referred to at page 18, *ante.*

As both the cases, therefore, cited by the learned counsel are to the same effect, it cannot complain that they are "uncertain and shifting guides."

XI.

Distinguishable Cases.

Of the cases cited in the brief of libellant, the following do not apply to the present case, for the reasons hereinafter stated in regard to each of them:

Shields vs. *Mayor*, 18 Fed. Rep. 748:

The question litigated was simply as to the existence or non-existence of negligence, and no question was raised such as the responsibility of the City for the acts of its departments.

The Fidelity, 16 Blatch., 569:

This case holds that a municipal steam-tug used by the Department of Public Charities and Correction of The City of New York in the performance of duties imposed on that department by law cannot be seized *in rem.*

The Giovanni vs. *City of Philadelphia*, 59 Fed. Rep., 303:

This case holds that a city which, pursuant to its Charter, engages in the business of towing vessels for hire is liable for a collision caused by the fault of its tug. It is evident in such a case that the City is on the same footing as a private corporation engaged in the towing business.

The C. F. Lotrobe, 28 Fed. Rep., 377:

In this case an ice-boat belonging to the City of Baltimore at the time of the collision was not employed in the public service, but was putting passengers and stores on board an out-going vessel, at the request of a disabled tug, taking the place of that tug for the purpose indicated.

Guthrie vs. *Philadelphia*, 73 Fed. Rep., 688:

In this case an ice-boat was engaged in a private secvice for which the City charged compensation. It was breaking a schooner out of the ice and towing her down the bay.

Greenwood vs. *The Town of Westport*, 60 Fed. Rep., 560:

In this case the damage was caused by a drawbridge operated by a town, as to which bridge the town had assumed the obligations, under the law, of a private corporation.

Haight vs. *Mayor*, 24 Fed. Rep., 93:

This was the case of a collision between a schooner and a steamboat in the service of the Department of Charities and Correction. The City was held not liable.

The decision in the Haight case was rendered by the same learned District Judge, whose decision in the present case was reversed by the Circuit Court of Appeals, and it seems impossible to reconcile his opinions in the two cases.

In the Haight case he applied the principle of the Maximilian case "as sustained by *principle and authority*," to a tug in the employment of the Department of Charities and Correction (see p. 39, *ante*), but in the present case he refused to follow the principle of the Maximilian case.

The exemption from liability of a municipal corporation for the acts of a fire department is, as has been shown by the long array of cases hereinbefore cited in Point V. of this brief, as absolute as the exemption of a city from liability for the acts of its Department of Charities.

In fact, in view of the stress under which a fire department must act in the extinction of fires, there is a much stronger practical reason for the exemption

in the case of a fire department than in that of a department of charities.

If, therefore, the City is not liable for damage caused by a collision of a tug employed in the Department of Charities and Correction it is surely not liable for negligence of a tug employed by the Fire Department.

It is impossible to reconcile the decision of the learned Judge in the Haight case with that in the case at bar, also rendered by him.

Edgerton vs. *Mayor*, 27 Fed. Rep., 230 :

In this case damages were recovered for negligence in the management of a draw-bridge over the Harlem River.

The distinguishing feature of this case, and which furnished the ground for the decision of the Court, was that the draw-bridge in question was part of a public highway, and that in its management the City was under the same rule of liability as regards the management of its streets and other highways.

Thompson Navigation Company vs. *The City of Chicago*, 79 Fed. Rep., 984 :

This case is cited in the supplementary brief of the learned counsel for libellant, and is apparently much relied upon him.

The first consideration which presents itself upon examination of this case is, that it does not appear whether the tug in question at the time of the collision was going to, or coming from, a fire—a question which has a very important bearing under the case of Farley *vs.* Mayor, 152 N. Y., 227, and is of great importance on the question of negligence.

It will be also noted that the case now cited was a decision of a District Court, and therefore has no

higher authority than the decision of the learned Justice at the District Court in the present case.

It is also to be noted that the learned District Judge, in the Thompson Navigation Company case entirely ignores the decision of the Circuit Court of Appeals in the present case, and avowedly overrules the decision of Chief-Justice Waite in the case of The Fidelity, 16 Blatch., 569—a decision made by the Chief Justice at the Circuit.

Commune de Charenton C. Gillett, Dalloz Jurisp. Generale, year 1883, part I., p. 211:

The citation of this case furnishes in a very striking degree an example of the danger of false analogy.

It would take very much more space than is at the disposal of counsel to point out the vital differences between the French and American systems of jurisprudence on such questions as this; but the fact cannot be contested by the learned counsel for the libellant that whether the Charenton case is rightly or wrongly decided under the jurisprudence of France, it is opposed to the entire weight of authority of our American courts.

The present counsel for the City of New York are entirely unable to perceive why a ruling of a French court in an ordinary action for damages for negligence is any more applicable to a case of collision in American waters than is the law on the same subject of negligence of municipal corporations of this country.

Surely, if we are to apply, as the City of New York contends, the ordinary rules of negligence law to the present collision, we can find that law most clearly laid down in this country, without seeking it from other and different systems of jurisprudence.

Bailey vs. *Mayor*, 3 Hill, 531:

See *ante*, pp. 11, 19.

The Siren, 7 Wall, 152:

This case is cited in The Thompson Navigation Co. *vs.* City of Chicago, 79 Fed. Rep., 984, so much relied on by libellant.

It appears, however, that the case sustains in no respect his contention.

In that case, the exemption of the Government was claimed on the ground that, being a sovereign, it could not be sued.

And this the Court held, but further held that as the Government came into court and made through its affirmative action the property upon which the claim existed subject to the Court's jurisdiction, in such case the Court could enforce the rights of private claimants upon the proceeds of the sale of the prize vessel in question.

* * * * * *

And the Court in this case said:

"It is a familar doctrine of the common law, "that the sovereign cannot be sued in his own "courts without his consent. The doctrine rests "upon reasons of public policy: the inconvenience "and danger which would follow from any different "rule. It is obvious that the public service "would be hindered, and the public safety "endangered, if the supreme authority could be "subjected to suit at the instance of every citizen, "and consequently controlled in the use and dis-"position of the means required for the proper "administration of the government. The exemp-"tion from direct suit is, therefore, without excep-"tion. This doctrine of the common law is "equally applicable to the supreme authority of "the nation—the United States. They cannot be "subjected to legal proceedings at law or in "equity without their consent; and whoever in-"stitutes such proceedings must bring his case

" within the authority of some act of Congress."
* * *

" The same exemption from judicial process ex-
" tends to the property of the United States, and
" for the same reasons. As justly observed by the
" learned judge who tried this case, *there is no dis-*
" *tinction between suits against the Government*
" *directly and suits against its property.*"

" For the damages occasioned by collision of
" vessels at sea a claim is created against the ves-
" sel in fault, in favor of the injured party. This
" claim may be enforced in the Admiralty by a pro-
" ceeding *in rem* except where the vessel is the
" property of the United States. In such case the
" claim exists equally as if the vessel belonged to a
" private citizen, but for reasons of public policy,
" already stated, cannot be enforced by direct
" proceedings against the vessel. It stands, in
" that respect, like a claim against the Government
" —incapable of enforcement without its consent,
" and unavailable for any purpose " (7 Wall., 153–155).

Joyce vs. *Metropolitan Board of Works*, 44 Law Times, 811 :

This case is open to the same objection as the French cases cited by the libellant, namely, as being under a system of jurisprudence which on the questions at issue is different from our own.

In the case cited, however, an examination of it shows that the only question litigated was the question of negligence, and that the question of the re-responsibility of the Metropolitan Board of Works for the fire brigade was scarcely put in issue.

XII.

The writ of certiorari should be quashed or dismissed.

Dated 7 April, 1899.

THEODORE CONNOLY,
JAMES M. WARD,
Advocates for Appellants.